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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

1980 TERM

LISA BULLWINKLE,

Appellant,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Appellee.

On Appeal From the Court of Appeal for the
Second Appellate District of California

JURISDICTIONAL STATEMENT

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NO. _____

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SUPREME COURT OF THE UNITED STATES

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LISA BULLWINKLE,	)
	)
Appellant,	)
	)
v.	)
	)
PEOPLE OF THE STATE OF CALIFORNIA,	)
	)
Appellee.	)
	)

On Appeal From the Court of Appeal for the
Second Appellate District of California

JURISDICTIONAL STATEMENT

QUESTIONS PRESENTED

Appellant Lisa Bullwinkle hereby appeals from a judgment of the Court of Appeal for the Second Appellate District of California, and presents the following questions to this Court:

I

Whether, as construed by the California Court of Appeal to mandate warrantless searches of closed containers of personal effects in all cases where a defendant is arrested for a felony, California Penal Code section 1412 and California Government Code section 26640 are facially, and, as applied in this case, unconstitutional in violation

of the Fourth and Fourteenth Amendments to the Constitution of the United States?

II

Whether, in the absence of exigent circumstances, a warrantless search of a closed container of personal effects in the exclusive custody and control of police violates the Fourth and Fourteenth Amendments to the Constitution of the United States?

III

Whether application of an "inevitable discovery" rule so as to allow findings of fact by a state Court of Appeal without evidentiary support, as were made in this case, deprives an appellant of due process of law in violation of the Fourteenth Amendment to the Constitution of the United States and acts to deprive her of a full and fair hearing on her motion to suppress evidence?

PARTIES BELOW

In addition to Lisa Bullwinkle and the People of the State of California, appellant's codefendant at trial, Edward Bullwinkle, was a separately represented party to the decision below and has filed a notice of appeal to this Court. Appellant Lisa Bullwinkle makes no representation as to his standing, under federal law, to challenge the searches of her purse in this case, or, given her challenge, of his standing to object to the subsequent search of their apartment.

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OPINIONS BELOW

There was no written opinion by the trial court: the oral arguments on the motion to suppress which is the subject of this appeal are reproduced from the record on appeal in the appendix as A. A.,[1] and the trial court's Minute Order of October 17, 1978, denying the motion is reproduced as A. B. The opinion of the Court of Appeal is reported at 105 Cal.App.3d 82, ____P.2d ____, 164 Cal.Rptr.163, and is reproduced in the Appendix as A. F. The order of that court denying rehearing is reproduced in the Appendix as A. G. The order of the Supreme Court of California denying hearing and "depublication" is reported in the Bancroft-Whitney official advance sheets of California Official Reports in 1980 volume number 19, July 10, 1980, at page 11. It is reproduced in the Appendix as A. H.

JURISDICTION

This is an appeal in a criminal case from the judgment and decision of the Court of Appeal for the Second Appellate District of California, filed on April 24, 1980, and from that court's order denying rehearing filed on May 21, 1980. The Court of Appeal affirmed appellant's conviction of felony.

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1. This record is reproduced to clarify the grounds on which the case was argued at trial, and is relevant to question III and the timing of the presentation of question I in the state courts.

Review was sought in the Supreme Court of California which, by order of June 25, 1980, denied appellant's Petition for Hearing; except in capital cases where a sentence of death has been imposed, review of criminal convictions by the California Supreme Court is discretionary. The decision of the Court of Appeal became final, under local practice, on this date.

Notice of appeal to this Court was filed in the Court of Appeal on June 26, 1980, and a copy of that Notice was served on the California Supreme Court on the same date. Copies of both Notices are reproduced in the Appendix as A. I. In the Court of Appeal and in the Supreme Court of California, appellant challenged the constitutionality of California Penal Code section 1412 and California Government Code section 26640, as they were construed by the Court of Appeal in this case. (Cf. Gooding v. Wilson, 405 U.S. 518 (1972).)

The appellate jurisdiction of this Court to determine the issue presented in Question I is thus conferred by 28 United States Code section 1257(2); see, Ybarra v. Illinois, 444 U.S. 85, ____, 62 L.Ed.2d 238, 245, 248-249 n. 11 (1979); compare, Richmond Newspapers, Inc. v. Virginia, ____U.S.____, fn. 4 (July 2, 1980); see also Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282 (1921); if the appeal has been improvidently sought as to this issue, review of this and the other questions presented is sought by certiorari

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//

under 28 United States Code sections 1257(3) and 2103.[2/]

If probable jurisdiction is noted as to Question I, jurisdiction over the remaining questions is grounded on the doctrine of Prudential Ins. Co. v. Cheek, 259 U.S. 530 (1921) as "other denial[s] of federal right[s] whether or not capable in [themselves] of being brought here by appeal." (Flournoy v. Wiener, 321 U.S. 253, 263 (1944); cf. Mishkin v. New York, 383 U.S. 502 (1966).) If the appeal as to Question I has been improvidently sought or is summarily affirmed, jurisdiction over Questions II and III is separately sought and conferred by 28 United States Code section 1257(3) and 2103.

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2. This jurisdictional statement is being filed within the time prescribed by Rule 20 to allow consideration of question I under 28 U.S.C., § 2103, and questions II and III under 28 U.S.C., § 1257(3) as well as § 2103.

CONSTITUTIONAL AND STATUTORY PROVISIONS RELIED UPON

CONSTITUTION OF THE UNITED STATES:

ARTICLE VI

* * * * *

"2. This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

AMENDMENT IV

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath of affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

AMENDMENT XIV

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to

any person within its jurisdiction the equal protection of the laws."

CALIFORNIA STATUTORY PROVISIONS

California Penal Code section 1412:

"When money or other property is taken from a defendant, arrested upon a charge of public offense, the officer taking it must at the time give duplicate receipts therefor, specifying particularly the amount of money or the kind of property taken; one of which receipts he must deliver to the defendant and the other of which he must forthwith file with the clerk of the court to which the depositions and statement are to be sent. When such property is taken by a police officer of any incorporated city or town, he must deliver one of the receipts to the defendant, and one, with the property, at once to the clerk or other person in charge of the police-office in such city or town."

California Government Code section 26640:

"The sheriff shall take charge of, safely keep, and keep a correct account of, all money and valuables found on each prisoner when delivered at the county jail. Except when otherwise ordered by a court of competent jurisdiction, the sheriff shall pay such money or sums therefrom and deliver such valuables or portions thereof as the prisoner directs and shall pay and deliver all the remainder of his money and valuables to the prisoner or to his order upon his release from the jail or to his legal representative in case of his death or insanity."

The statutes under which the appellant was arrested (Cal. Pen. Code, § 476a) and under which she was later additionally charged (Cal. Pen. Code, §§ 459 and 496) are reproduced in the Appendix as A. K. The statute under which her motion to suppress was made and preserved for appeal, California Penal Code section 1538.5, is reproduced in the Appendix as A. L. The California statutes providing for the setting and posting of bail in felony cases (Cal. Pen. Code, §§ 815a and 1269b) are reproduced in the Appendix as A. M. California Rules of Court referred to in the Statement of the Case (Rules 24, 27, 29, 31, and 33) are reproduced in the Appendix as A. N.

STATEMENT OF THE CASE

A. Proceedings Below

Appellant Lisa Bullwinkle and codefendant Edward Bullwinkle were arrested in their home on a felony warrant charging them with violations of California Penal Code section 476a (writing checks with insufficient funds). After carrying appellant's purse out of the apartment, one of the arresting officers conducted a cursory search of the purse and both defendants were then transported to a police station. Following a second warrantless station house search of the purse, the search which is the subject of the opinion below, a warrant to search their home was issued and executed; each defendant was subsequently charged in a single information with six additional counts of burglary (Cal. Pen. Code, § 459) and receiving or concealing stolen property (Cal. Pen. Code, § 496).

After denial of a joint motion -- brought under California Penal Code section 1538.5 -- to suppress the evidence found in the search of the purse and that seized under the resulting warrants, appellant pled guilty to four counts of receiving stolen property and was immediately sentenced to a term of three years. In California, the issues raised in a motion to suppress evidence are preserved for appeal after a guilty plea (Cal. Pen. Code, § 1538.5(m); Cal. Rules of Court rule 31(d), para. 2). Appellant Lisa Bullwinkle appealed; Edward proceeded to trial and was ultimately sentenced on pleas and guilty verdicts.

The warrantless searches of the purse had been justified in the trial court as "delayed-incident-to-arrest" searches,

and appellant's appeal to the California Court of Appeal briefed this issue, relying on United States v. Chadwick, 433 U.S. 1 (1979). The People responded in kind, relying on United States v. Edwards, 415 U.S. 800 (1974), and briefing was completed on July 9, 1979, with the filing of appellant's reply brief.

On August 22, however, codefendant Edward, now on appeal himself with separate counsel, moved to consolidate his and Lisa's appeals and incorporated her brief in his own;[3] on August 24, the appeals were ordered consolidated. (Copy of Order reproduced in Appendix as A. E.) On October 22, the People filed their brief in Edward's case, and for the first time argued the possibility that the purse could have been searched at booking, using this argument to buttress an assertion that, since there was to be a booking search, appellant had no expectation of privacy in the purse. Therefore, the People argued, the "delayed incident to arrest" search did not violate the Fourth Amendment.

In a November 5 letter[4] to the Court, however, after all briefing was completed in both cases, the People asserted an "accelerated booking search" theory as a separate and distinct

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3. Under California's "vicarious" standing rules, codefendant Edward's standing to challenge the search of Lisa's purse was clear. (See People v. Martin, 45 Cal.2d 755, 290 P.2d 855 (1955).)

4. A practice of "letter briefing" additional or supplemental points or authorities has developed in California, and such a letter is served, filed, and considered as if it were a supplemental brief.

ground on which to affirm the convictions. The People cited, for the first time, two cases to support this theory, cases which were available, but not cited, throughout this case. Appellant promptly moved to augment the record on appeal[5/] to demonstrate that the theory had not been raised below and, relying on California law that cases will not be decided on theories not raised at trial but ". . . thereafter invented for the consumption of reviewing courts . . ." (People v. Superior Court (Simon), 7 Cal.3d 186, 198, 496 P.2d 1205, 101 Cal.Rptr. 837 (1972)), argued that the Court of Appeal should not reach that issue. The motion to augment was granted on December 6, 1979.

In their first, June 20, brief, the People had argued that the initial search, which they characterized as the "key issue," was for weapons, and that that search permitted the police to see checkbooks "in plain view." The search for weapons, they asserted, was itself justified by Chimel v. California, 395 U.S. 752 (1969). Between their June 20 filing, however, and their November 5 letter, case-law developments seriously undermined this contention.

On the day the People filed their first brief, this Court decided Arkansas v. Sanders, 442 U.S. 753, (1979), reaffirming United States v. Chadwick, supra. On May 25, but not cited in their June 20 brief, the California Supreme Court had decided People v. Minjares, 24 Cal.3d 410, 591 P.2d

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5. The normal record on appeal in California does not include all of the trial filings (Cal. Rules of Court, rule 3 a), and augmentation is necessary to put before the Court of Appeal matters of record not part of the normal record.

514, 153 Cal.Rptr. 224 (1979), and on August 22, this Court refused to stay the mandate in that case (California v. Minjares, ____U.S.____, 61 L.Ed.2d 825 (1979)). Certiorari was denied in Minjares on October 7. (444 U.S. 887.) On July 12, 1979, the California Supreme Court allowed yet another Court of Appeal decision reversing on the authority of Chadwick to stand[6] People v. Pace, 92 Cal.App.3d 199, ____P.2d____, 154 Cal.Rptr. 811 (1979)), and on August 16, 1979, in People v. Dalton, 24 Cal.3d 850, 598 P.2d 467, 157 Cal.Rptr. 497 (1979), cert. den. ____U.S.____, 63 L.Ed.2d 781 (Mar. 24, 1980), the California Supreme Court squarely held that probable cause to believe that a container held a weapon was not enough, when the container was in the custody of police and in the absence of exigencies, to

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6. In addition to its discretionary power to review cases on the merits, the California Supreme Court has the power to "depublish" opinions selected by the deciding Court of Appeal for publication (Cal. Rules of Court, rule 976(c)). Unpublished opinions may not be cited (Cal. Rules of Court, rule 977), and published opinions are considered to have the force of law (Auto Equity Sales, Inc., et al. v. Superior Court (Hesenflow), 57 Cal.2d 450, 369 P.2d 937, 20 Cal.Rptr. 321 (1962)). The California Supreme Court is generally considered to use this power of "selective publication" as a vehicle to direct the development of California law without the necessity of granting hearing, and the concomitant constitutional requirements of argument and written opinion (Cal. Const., art. VI, § 3; art. VI, § 14; People v. Brigham, 25 Cal.3d 283, 599 P 2d 100, 157 Cal.Rptr. 905 (1979)). See also Report of the Chief Justice's Advisory Committee for an Effective Publication Rule (June 1, 1979).

justify a warrantless search. Finally, on June 12, in United States v. Cornejo, 598 F.2d 554 (9th Cir. 1979), the United States Court of Appeals for the Ninth Circuit had strongly hinted, on facts remarkably similar to those here, that the immediate search of a purse was barred under Chadwick.[7/]

Nevertheless, following the belated lead of the Attorney General, the state Court of Appeal found Chadwick "inapplicable," ignored the initial search "for weapons" and called the second search an "accelerated booking search." In the absence of any evidence that the purse would, in fact, have been searched at a later time, the Court of Appeal found a mandate for the search in California Penal Code section 1412 and California Government Code section 26640.

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7. Citing these developments, appellant, who had been denied bail on appeal by the trial court, moved the Court of Appeal to summarily reverse or order her release on her own recognizance. By order of September 6, 1979, that motion was denied without prejudice to its renewal in the trial court. (Copy of order reproduced in the Appendix as A. C.) Upon the renewed application, the appellant's pretrial bail of $50,000 was reduced to $6,000, and she was released by the trial court on September 24, 1979. (Copy of bail order reproduced in the Appendix as A. D.) A motion to continue that bail while this appeal pended was denied by the Court of Appeal on July 10, 1980. (Order reproduced in Appendix as A. J.) An application to Mr. Justice Rehnquist to do so was summarily denied by an endorsement dated July 17. (Bullwinkle v. California (unreported, No. A-52, July 17, 1980)). The application was renewed to Mr. Justice Stevens on July 23, 1980, and by him was referred to the full court. Appellant was remanded to custody on August 4, 1980. The application is still pending as of this writing.

Appellant timely applied to the Court of Appeal for rehearing, itemizing the specific grounds asserted in Questions I and III of this petition and also asserting that "The question [of the effect of United States v. Chadwick, supra, on booking searches] . . . is precisely the one framed by this court; this court thus should have first determined what effect Chadwick had on any search of this purse. [¶] By bowing to statutes however . . . this court has sidestepped the substantial question of the effect of Chadwick on so-called 'booking' searches and has trampled on the Supremacy Clause." (Petn. for Rehg., p. 5.)

Appellant also noted specific findings of fact assumed by the Court of Appeal without evidentiary support, briefed the inapplicability of the statutes found controlling by the Court of Appeal, and cited those statutes which contradicted the Court of Appeal's assertion that the "normal," and therefore inevitable, result of a felony arrest is booking.

In California, a reviewing court may grant rehearing on petition, or on its own motion, for any reason prior to the time the decision becomes final as to that court, i.e., within thirty days after the decision is filed. (Cal. Rules of Court, rule 24(a) and 27.) A petition for rehearing in a court of appeal is a mandatory prerequisite to review by the California Supreme Court if "substantial issues of law or fact were incorrectly stated or were not considered in the opinion of the Court of Appeal . . . ." (Cal. Rules of Court, rule 29(b).)

Rehearing was denied by the Court of Appeal on May 21, 1980, and appellant timely sought a hearing in the Supreme Court of California, again specifically setting forth in that petition the questions here presented. Appellant's petition for hearing in the California Supreme Court was denied by order of June 25, 1980, and the opinion of the

Court of Appeal was allowed to remain published.[8/] Notice of Appeal to this Court was filed on June 26, 1980.

B. Statement of Facts

The motion to suppress had originally been made at the preliminary hearing in the municipal court. When the motion was renewed in the superior court after the defendants were bound over to that court, the motion was submitted on the transcript of the preliminary hearing and additional testimony adduced at hearing de novo. That evidence supported the following findings:

Three persons were in the Bullwinkle apartment when Detectives Alpert and Watson of the Santa Barbara Police Department arrived to serve the warrant and effectuate the arrest. The detectives were immediately admitted without incident, and both defendants identified themselves. Lisa was allowed to go to an upstairs bedroom alone, according to the detectives to change clothes; when Detective Watson heard a door close, he followed her upstairs and into one of two bedrooms. Edward followed Watson and was himself followed by Alpert, all four eventually coming to the bedroom. The third person was allowed to remain downstairs alone.

Lisa never changed clothing, though Edward did. As all were about to leave, Alpert asked Lisa whether she wanted to take her purse, indicating a closed leather bag on

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8. See footnote 6, ante at 10. The California Public Defender's Association and the Los Angeles County Public Defender, as amicus curiae, requested "depublication" of this decision. That request was denied. Chief Justice Bird and Associate Justice Mosk voted to grant a hearing which, in California, would have automatically "depublished" the Court of Appeal's opinion.

the floor. Lisa responded no, that bag only had a camera but then, according to the detectives, picked up another bag, her purse, from the floor. Watson immediately seized it and handed it to Alpert. It was never returned to Lisa's custody.

Lisa never said that she wanted to take the purse with her. She was never told it would be seized or searched, and in fact the closed purse remained closed while Alpert carrying it, escorted the Bullwinkles back down to the living room and out of the apartment to the squad car.

Alpert testified that at the car he looked into the closed purse, for the first time, "for weapons." He saw none but said he noticed "numerous" checkbooks. He retained the purse, and after he and Watson had transported the Bullwinkles to the police station and had placed both of them in an interview room, Alpert decided to search the purse and immediately dumped the contents on his desk. He testified that this was <u>not</u> a booking search, nor an inventory search, but a search for evidence of the offenses charged and other similar offenses, for "checks or cancelled checks of the Bank of America and Security Pacific Bank or any other bank." Alpert then began calling banks he had identified from items in the purse to determine whether they had taken losses.[9/]

While Alpert had the contents of the purse spread

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9. In fact, Alpert testified, the officers had been looking for checkbooks ever since they had entered the apartment, and Lisa testified (and was corroborated by the third person in the apartment) that she went upstairs in response to the detective's orders to get her checkbooks and picked up her purse on Watson's order as well.

on his desk, a third officer, Rogers, assigned to the burglary detail, came by. Looking at a passport which had been in Lisa's purse, Rogers thought he recognized the photo, which was of Edward Bullwinkle. Going to his file, he pulled out a composite sketch of a burglary suspect named Hunt who had used a military I.D. to sell stolen cameras. Rogers also saw a picture of Bullwinkle in a military uniform among the items from the purse, and Alpert told him of a notebook containing what appeared to be names and serial numbers of cameras. Finally, Alpert said that they had seen "numerous" cameras at the scene. Rogers compared the notebook entries to the list of stolen equipment which he had and then, based on that information, obtained a telephonic search warrant for the Bullwinkle residence.

In that search, a substantial amount of stolen camera and electronic equipment was discovered, which led to the filing of the burglary and stolen property complaints herein.

No evidence was introduced to establish how, when, where, or under what conditions the Bullwinkles would have been "booked." No evidence was adduced directed at the general practice of the police department when "booking" an item such as a purse, or directed at the scope of such a search. No evidence as to the setting, or possibility of posting, immediate bail was introduced though California statutes mandate a setting of bail when a felony arrest warrant issues, and allows police to accept that bail (Cal. Pen. Code, §§ 815a and 1269b), or one listed on a bail schedule (Cal. Pen. Code, § 1269b(e) and (f)). No evidence of the existence of independent "leads" to the evidence in the apartment was introduced, nor was there any evidence that

Rogers would have, but for the evidence in the purse, been able, or even attempted, to secure a warrant.

California Penal Code section 7, subdivision 21 defines "booking" as:

> ". . . the recordation of an arrest in official police records, and the taking by the police of fingerprints and photographs of the person arrested, or any of these acts following an arrest."

California Government Code section 26640 only applies to sheriffs by its own terms, and California Penal Code section 1412 applies to receipts for property thought to have been stolen; both statutes were construed, however, to require searches by all police agencies of the personal property of all felony arrestees. No sanctions exist in California statutory or decisional law for failure to comply with this "mandate."

ARGUMENT

The state court faced a claim that United States v. Chadwick, 433 U.S. 1 (1977) barred any search of this purse. Rather than addressing this issue the state court found a statutory mandate for a booking search of the purse, and then, reasoning backwards, found that since that invasion was to take place eventually, that any prior invasion was legal as well. Thus it did not matter that the actual search was not an inventory search; any prior invasion would be constitutional. Nor did it matter that in an actual booking search, the evidence would not have been discovered; since the accomplished search was legal as an anticipatory invasion, any discoveries in that search were admissible.

The factual findings that the search would occur was based on statute; any lesser intrusion or other means to secure the property was barred by statute; and any factual defense to actual police procedures was rendered irrelevant by statute.

The original question, of the effect of Chadwick on the searches, was ignored.

I

Question I therefore presents the issue of whether a state may require, by statute, inventory searches of closed containers of personal effects. The statutes at bar have been so construed by authoritative state pronouncements. This statutory mandate was the only, and thus necessary basis, for the state court's factual determination that some search of the purse would have "inevitably" occurred in this case.

That mandate also defined the scope of the thus required search, eliminated the possibility of less intrusive methods of reaching the statutory objectives, and, as applied, made irrelevant the fact that the "accelerated booking search" at bar was not a booking search at all, but was instead a generalized search without warrant. The statutory scheme is thus central to the decision below and invokes the appellate jurisdiction of this Court.

Both the effect of the statutory scheme and the necessity of it to the result reached by the Court of Appeal in this case is most easily perceived by noting the facts that the Court of Appeal assumed or avoided, and the alternatives to a full search which were not considered. Since the there was never any actual booking search (compare People v. Harris, 105 Cal.App.3d 204, ____Cal.Rptr.____, ____P.2d____ (1980); and People v. Bundesen, 106 Cal.App.3d 508, ____Cal. Rptr.____, ____P.2d____ (1980))), the "accelerated" booking search rationale was necessary. Yet, there is no evidence in this record that the defendants could not have made bail, that they would have been booked, that the booking would have necessarily entailed a search of the purse, that the imagined booking search would have exposed all the evidence exposed when the purse was emptied onto Alpert's desk, or that during a less intrusive, later, or spacially distant search, Rogers would have made the same fortuitous discovery which he did.

Justice Ashby conceded in the opinion below that reliance on the accelerated booking search theory would be misplaced if no booking search would in fact have occurred. To supplant the missing evidence that the purse would have been searched at booking, or that it would have been

searched as thoroughly, the Court of Appeal found a "requirement" for such a search in California Penal Code section 1412 and Government Code section 26640. In so finding, however, the court below did not simply hold that the stationhouse search was unlawful but that the challenged resulting evidence would have been found anyway. The court went further and found instead that the very invasion challenged was legal itself, and legal because of the statutes. Given that Rogers would not have been present at an actual booking search, this holding was also necessary to the decision.

> ". . . [T]he purposes of a booking search include not only to prevent contraband and weapons from entering the jail, but also to account for the valuables and other property of the prisoner, which the police are mandated by statute to do. (Pen. Code, § 1412; Gov. Code, § 26640.) Such a search is not like the inventory of the contents of an automobile disapproved in Mossetti v. Superior Court, 4 Cal.3d 699, 709-710. The duty to account for the valuables and property taken from a prisoner upon jailing is specifically mandated by statute, and appears to be greater than the duty of slight care or ordinary care which Mozzetti held was owed toward impounded automobiles. A purse is precisely the place where the money and valuables contemplated by the statutes would normally be found." (105 Cal. App.3d at 88-89; emphasis added; fn. omitted.)[10/]

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10. Of course, as a matter of state law, the statutes, set forth by the state court in a footnote, need not have

Furthermore,

". . . [T]he validity of an accelerated booking search does not depend upon facts which might have been contested had the matter been raised earlier. Since Lisa's arrest was for a felony, no factual showing that she actually would have been booked is involved. Unlike the cases cited by appellants, the validity of an accelerated booking search does not require the police officer's subjective belief that he is actually conducting a booking search, nor would it be

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[Fn. cont'd.]
been given such a construction. Indeed, as a reading of them demonstrates, the Court of Appeal stretched to do so.

Government Code section 26640 relates to the duties of sheriffs. That is its only concern. Even assuming that the statute could subsume the intrusive and unconstitutional mandate attributed it by the Court of Appeal, it still is irrelevant by its own terms to the case at bar in the absence of evidence that the Santa Barbara Police Department would have surrendered custody of the Bullwinkles to the sheriff. Even then it only applies to property taken from a prisoner, i.e., a person unable to make bail and therefore to be placed in jail.

Penal Code section 1412, which is applicable to police departments, is even more obviously irrelevant. It is part of Chapter 12, Division 10, Part 2 of the California Penal Code, "Disposal of Property Stolen or Embezzled." It must be read in pari materia with section 1407 ("When property, alleged to have been stolen or embezzled . . .") section

negatived by the officer's express concession, as in this case, that he was not conducting a booking search. The theory is that the privacy of the prisoner and her effects would have been invaded anyway, and that therefore no greater intrusion on that privacy occurs wher the search is conducted other than during the booking process. Finally, the validity of a booking search of this type should not hinge upon distinctions as to the particular police stations or jails. As we have discussed, the statutory duties imposed upon the police to account for and safeguard a prisoner's property, and the easy susceptibility of a purse to theft of its contents, justify inventorying its contents even in stations where individual property lockers might be available." (Ibid., at 90; fn. and citations omitted; emphasis added.)

[Fn. cont'd.]

1408 ("On application of the owner . . . the magistrate before whom the complaint is laid, or who examines the charge against the person accused of stealing or embezzling it . . ."); section 1409 ("If the property stolen or embezzled . . ."); section 1410 ("If the property stolen or embezzled . . ."); section 1411 ("If the ownership of the property stolen or embezzled . . .); section 1413 ("The clerk . . . shall enter in a suitable book a description of every article of property alleged to be stolen or embezzled . . ."). It merely provides for receipts to a defendant from whom allegedly stolen property is taken. By its own terms it has no relevance to a booking search but as construed by this Court of Appeal it is controlling. That construction of state law is, of course, binding on this Court. (Gooding v. Wilson, 405 U.S. 518 (1972).)

Thus, without these statutes no basis existed for finding that a booking search would have taken place; even with the mandate no evidence exists that such a search would have uncovered, or discovered, the evidence found. Given this statutory mandate, however, and its application in this case, an "accelerated" booking search can be justified for every felony arrest no matter how unlawful the actual search under applicable precedent, how unlikely the search under the actual facts, or how intrusive the invasion compared to other actually available means of securing the property. In practice it will leave unfettered discretion in the hands of the police, and is a license to ignore the warrant requirement.

The "anticipatory" nature of the search in this case, and the conjectural basis for concluding that the evidence would have been found, underscores that actual rationale of the decision: that any search, no matter how unlawful, will be purified if a later lawful search might have exposed, though not necessarily led to discovery of, the same evidence.

As sweeping as this holding is, it is clearly California law. While this is the only California decision of which counsel is aware which relies on the statutes to provide a factual basis for concluding that a search would take place, it is not the first, or last, case to cite them to justify such a search. (See, e.g., People v. Ross, 67 Cal.2d 64, 70, ____P.____, ____Cal.Rptr.____ (1967) revd on other grounds, 391 U.S. 470; People v. Balassy, 30 Cal.App.3d 614, ____P.____, ____Cal.Rptr.____ (1973); People v. Gilliam, 41 Cal.App.3d 181, ____P.____, ____Cal.Rp .____ (1974).) More importantly, these statutes have been relied upon since the decision in the instant case.

(People v. Harris, People v. Bundesen, both supra.) Most importantly, the California Supreme Court refused the opportunity to review both Harris and Bundesen, and refused to review both subsequent to its examination of the instant case; that Court has allowed the decisions to remain published (see fn. 6, ante, at p. 10) and has thus given its approval to this statutory construction.[11/]

Calling the stationhouse search an "anticipatory inventory," however, does not resolve the conflict of such a holding with Chadwick or Sanders, or the effect of those cases on either the first "delayed-incident-to-arrest" search or the second stationhouse search. It does, though, raise the question of the constitutionality of any inventory search of personal possessions.

This Court has given general approval in non-criminal contexts to routine inventory searches of automobiles, noting that they are a different kind of "effect" than others which might be possessed by an arrestee. (South Dakota v. Opperman, 428 U.S. 364, 367 (1976).) Even in that limited context, however, this Court approved only inventories conducted "pursuant to standard police procedures." (Ibid., at 372.) Moreover, the search must be "aimed at securing or protecting the car and its contents" (ibid., at 373, emphasis added), and must not be a "pretext concealing an investigatory police motive." (Ibid., at 375.)

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11. In Harris, Justice Newman joined the two Bullwinkle votes to grant hearing. One unreported decision, reversing over a dissent based entirely on the decision in this case, was also denied hearing. Inexplicably, no Justices voted to review. (People v. Rawlins, (unrep. Cal.Ct.App. No. 2 Crim. 35803, May 23, 1980).)

Opperman illuminates the flaws in the reasoning below. As constructed, the Court of Appeal opinion holds first that an inventory search is constitutionally permitted. Given the difference in "storability" and "mobility" between an automobile and a purse, that holding is wrong and the rationale of Chadwick, relying on an "exclusive control" element, is consistent with and indeed mandates this distinction. All the goals of the inventory noted by this Court in Opperman could, but for the statutory mandate, be accomplished by locking up the property as a whole. Secondly, an inventory search, if allowed at all, must in fact be an inventory search; if it is not, the warrant requirement comes into play. Here, the record is clear that this was not an inventory search, whatever such a "standard" search may entail (on which this record is also silent) and a warrant, under Chadwick, was required.

Thus, both the underlying assumption of the court below, that an inventory search is constitutional, and the application of the doctrine to a search which is not an inventory, present substantial questions under prior rulings of this Court. By raising the inventory issue, however, the court below obscured the originally litigated question in this case, which arises under Chadwick, and even if an inventory search of personal belongings is constitutional in some situations, the holding below highlights the conflict between an "anticipatory" inventory search, and Chadwick. Either on their face, or as applied in this case, these statutes justify an illegal search and are unconstitutional under the Fourth Amendment.

II

In Arkansas v. Sanders, 442 U.S. 753, 61 L.Ed.2d 235, 99 S.Ct. 2586 (1979), this Court reserved the question of the effect of United States v. Chadwick, 433 U.S. 1, supra, on searches of personal luggage carried by an arrestee and searched "incident to arrest." (Sanders, supra, 442 U.S. 753, 61 L.Ed.2d at 245, fn. 11.) That question could not be easily resolved because of the apparent conflict between common pre-Chadwick notions of the proper scope of a "search incident," and Chadwick's logical underpinnings which reason that once police have exclusive control of a closed container, the reasons for the Chimel "extension of the person-search" doctrine vanish. Thus under Chadwick, absent exigencies, a warrant is necessary once the suspect can no longer destroy evidence or seize a weapon. (Chadwick, supra, at 14-15; see also, Mincey v. Arizona, 437 U.S. 385, 393 (1978).) The delayed "search" of the person approved in United States v. Edwards, 415 U.S. 800 (1974), relied on by the People below, is inapplicable to closed containers (Chadwick, supra, at 16, fn. 10), and the holding of that case has apparently been "limited to its own facts" (United States v. Berry, 560 F.2d 861, 864 (7th Cir. 1977) vacated on other grounds, 571 F.2d 2 (7th Cir. 1978); see also, United States v. Schleis, 582 F.2d 1166, 1171 (8th Cir. en banc, 1978) on remand from this Court "for reconsideration in light of United States v. Chadwick." (Schleis v. United States, 433 U.S. 905 (1977).) At the very least, the tension between Edwards and Chadwick has not been addressed by this Court. Nor does the person-search approved in United States v. Robinson, 414 U.S. 218 (1973), justify further intrusion into personal effects removed from the arrestee. (Chadwick, supra, at 16, fn. 10.)

It is apparent that in most cases where police control of a closed container is sufficient for them to search it, that their control will be exclusive; opening a container and exposing its contents while an arrestee still has access to the evidence or weapons feared to be inside would be reckless indeed. Such cases will arise (see, e.g., People v. Flores, 100 Cal.App.3d 221, ____P.2d____, ____Cal. Rptr.____ (1979)) and those cases will present difficult factual questions. (See, e.g., United States v. Garcia, 605 F.2d 349 (7th Cir. 1979).) The case at bar, however, is not such a case; control of this easily controllable item was continuous, complete, and unthreatened from the time the officer seized it, until he first invaded it, significantly later and distant from the seizure. Thus, the underlying assertion of right in this case, and the one litigated in the trial and the initial stages of the appeal raised precisely the issue reserved in Sanders. Nevertheless, Sanders, Chadwick, and their California progeny were all found "inapplicable" by the court below.

The Chadwick-Sanders rationale cannot, however, protect only the privacy interest in containers found in automobiles and that fact is underlined by the arguments in those cases which attempted to shoehorn those searches into the "automobile exception" to the warrant requirement. The rationale of the opinion in this case creates a much larger exception, and eliminates application of Chadwick to any search of any container carried by a felony arrestee no matter when, why, or how the search is accomplished. The only possible limitation to this holding, that only containers likely to contain valuables must be searched, invades the

privacy of the very items in which the privacy interest is strongest, while protecting the lesser privacy interests of items such as diaper boxes (People v. Dalton, 24 Cal.3d 850, 157 Cal.Rptr. 497, 598 P.2d 467 (1979); cert. den. California v. Dalton, 63 L.Ed.2d 781, 100 S.Ct. 1345 (1980)), lunchpails (People v. Pace, 92 Cal.App.3d 199, 154 Cal. Rptr. 811 (1979)), or, it has been argued, paper bags. (United States v. Ross, No. 78-698 (D.C.Cir, Apr. 17, 1980), Bazelon, J., dis; rehg. granted en banc.)

The opinion below accomplishes this unique inversion by finding a mandate in state law so definite as to override all other Fourth Amendment considerations, so positive as to justify dispensing with any factual bases, and so compelling as to mandate disregard of any possibility of lesser intrusions which might protect the same state interest. It is these failings which make the statutory scheme unconstitutional; it is the need to avoid these questions, to reach the result here, which makes that scheme critical to the decision below, and the refusal to address the thus-created conflict between Chadwick and inventory searches, allowed the erroneous conclusion below.

III

Finally, the "accelerated" part of the decision below, constructing as it does an "inevitable invasion" test to avoid the warrant requirement, represents a sharp departure from the inevitable discovery rule which has grown from this Court's previous, though cryptic, comments. This Court has never specifically addressed the prerequisites to this exception to the warrant requirement.

The "accelerated booking search," as articulated in California, is a species of the inevitable discovery rule, which in turn is a product of the independent source rule early enunciated in Silverthorne Lumber Company v. United States, 251 U.S. 385 (1920); see People v. Superior Court (Tunch), 80 Cal.App.3d 665 (1978);[12] see also LaFave, Exclusionary Rule, section 11.4, pp. 617-620. No evidence appears in this

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12. The "independent source" can be an independent lead to the evidence actually found by exploiting an illegal search, or it can be a true inevitable discovery of the evidence illegally brought to light. In either instance, the burden is on the state to establish the independent lead or the inevitability of the discovery. In neither situation, however, has this "exception," one of the "few and jealously guarded," been applied where the only inevitable source would have been the warrant which was not obtained. See, for example, Chadwick, itself, where probable cause was undisputed, and a warrant a foregone conclusion. If the possibility of a later warrant can purify an earlier illegal search, on the same "inevitable invasion" logic as was applied in the case at bar, the warrant requirement would [Fn. cont'd.]

record, however, which establishes that any independent leads to the evidence seized under the warrant existed which would, or even could, have led to that evidence independent of that found in the purse. There is no factual support for an "independent source," and to the extent that some evidence is necessary to support the factual findings -- such as that a booking search would have taken place -- these findings without support deprive the appellant of due process of law. (Thompson v. City of Louisville, 362 U.S. 199 (1960); Vachon v. New Hampshire, 414 U.S. 478 (1974.) This constitutional prohibition against findings without sufficient evidence applies with like force to state appellate and trial courts. (Jackson v. Virginia, 433 U.S.____, 61 L.Ed.2d 560 (1979).) The necessity for factual support is so important a part of due process, that factual findings without evidentiary support will justify federal oversight even in areas normally left to the states, since the effect is to deprive the litigant of a full or fair hearing on those factual matters. (Stone v. Powell, 428 U.S. 465 (1976).)

[Fn. cont'd.]
become an empty formality. The evidence, rather, must be suppressed because the search attempted to avoid the warrant requirement, thus serving the deterrent value of the exclusionary rule. The subjective intent of the searcher considered in Opperman is important in the anticipatory situation in judging whether the officer was acting illegally or not. The "anticipatory invasion" logic of the court below would, however, justify every search where a warrant would have been available.

The independent source origin of the "inevitable" discovery rule represents an attempt to insure that police will not benefit from their illegal conduct, while assuring that the "constable's blunder" will not forever bar the use of evidence which would have been legally discovered anyway. Thus, some route to the challenged evidence which bypasses the illegality must be demonstrated. Even prior to the instant case, however, the "inevitability" requirement of the discovery had been diluted in California:

> "It is urged . . . that without the invalid police search the evidence of his automobile would not have been inevitably discovered. It is true that the term does ordinarily have the connotation of 'certainty,' but so considered it appears to be a misnomer. Nowhere in the many definitive authorities does it appear that the police with 'certainty' would have obtained the evidence 'from an independent source.' Instead the rule's requirement is that it would have been discovered 'in the normal course of a lawfully conducted investigation' [citations], or that 'there are independently sufficient "leads"' [citation], or there was a 'likelihood that it would have subsequently been discovered through other police efforts' [citation], or that the police would reasonably be expected to obtain the evidence 'by an independent investigation' [citation]. The test is not one of certainty, but rather of a reasonably strong probability." (People v. Superior Court (Tunch), supra, at 680-681, first emphasis in original; citations omitted.)

Compare, Chapman v. California, 386 U.S. 18 (1967).

Despite even these limits, the end result is often significantly more conjectural; the rule is applied based on little more than a suspicion, without any factual findings by the trial court to support it. "Would" becomes "could":

> "The significance of the word 'would' cannot be overemphasized. It is not enough to show that the evidence 'might' or 'could have been' otherwise obtained. Once the illegal act is shown to have been in fact the sole effective cause of the discovery of certain evidence, such evidence is inadmissible unless the prosecution severs the causal connection by an affirmative showing that it would have acquired the evidence in any event. In order to avoid the exclusionary rule, the government must establish that is has not benefitted by the illegal acts of its agents; a showing that it might not have so benefitted is insufficient." (Maguire, How to Unpoison the Fruit, 55 J.Crim.L.C. § P.S. 307, 315 (1964).)

But "[t]o admit unlawfully obtained evidence on the strength of some judge's speculation that it would have been discovered legally anyway would be to cripple the exclusionary rule as a deterrent to improper police conduct." (United States v. Castallana, 488 F.2d 65, (5th Cir. 1974), mod. 500 F.2d 325.)

Even California's Tunch court noted:

> "'Courts should be careful to prevent application of the inevitable discovery exception from subverting the safeguards of the exclusionary rule.' [Citation.] [For t]here is much danger that a

mechanical application of the doctrine will encourage unconstitutional shortcuts. [Citation.]" (People v. Superior Court (Tunch), supra, 80 Cal. App.3d at 681.)

Once the court below established a mandate requiring some search, and thus found that a search would take place,[13/] it still had to find that the "discovery" of the evidence, or in this case, of its relevance, would "most likely" have occurred. On this record, such a finding was impossible. At this point in its analysis therefore, the Court of Appeal had to otherwise justify the illegal discoveries, and at this point stepped over the line from "would" to "could" and from "inevitable" to "possible."

The court made this transition by focusing not on the discoveries that would "most likely" occur, but on the invasion of privacy which, given strict compliance with the statutory "mandate" certainly would. Thus, the court reasoned, if some invasion would be made anyway, no violation of the Fourth Amendment occurs if it merely happens sooner, regardless of the illegality of the actual invasion. In traditional inevitable discovery analysis, the challenged search is found illegal but "harmless" because of the inevitable discovery of the evidence in any event; in the instant case the challenged search was rendered legal itself as only an anticipatory invasion. In the Court of Appeal's view, evidence found in that now-purified search thus is properly exposed, and the fact that the discovery by Rogers

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13. Even though no sanctions exist in California law for failure to perform this "duty."

might not have been made at an actual booking, in a city lockup or county jail away from his stationhouse haunts, becomes irrelevant, as does the fact, uncontested in this case, that the stationhouse search was not an inventory search at all, but precisely the kind of generalized search proscribed by Chadwick. This holding flies in the face of the holding in Chadwick and the rationale of Opperman. It is dangerously close to voiding the warrant requirement altogether.

The illogic of the Court of Appeal is seductive. Its flaw is that it gives police the direct benefit of their illegal actions, thus effectively nullifying the exclusionary rule and overruling Wong Sun v. United States, 371 U.S. 471 (1973). When combined with the mandate found in the statutes, the logic would justify most searches challenged on Chadwick grounds. Even without that mandate, however, it is clear that what the Court of Appeal has held is that if it is possible that the evidence would have been discovered legally, that any prior discovery will be upheld. Inevitability has become conjecture. That is a far cry from finding that an independent source existed, or even that the evidence "most likely" would have been independently discovered.

If there is to be an inevitable discovery exception to the exclusionary rule, that exception must be defined by this Court. As this case demonstrates, and as the Tunch court warned, the exception can too easily swallow the rule. This "exception," as the others to the Fourth Amendment, should be carefully delineated.

CONCLUSION

The holding of this case, that personal luggage of an arrestee in the exclusive, continuous, and unthreatened control of the police may be searched, is in conflict with Chadwick. The holding that an inventory search of that property is required in all felony arrests, as at odds with the rationale of Opperman. Application of the inventory rule where the search is not in fact an inventory search codifies an approval of the "pretext" search condemned in Opperman, and fails to come to grips with the conflict thus created with Chadwick. If the stationhouse search cannot be justified as an anticipatory inventory, then the critical question becomes that reserved in Sanders. For all these reasons, and because of pervasive effects of this holding, the questions presented are substantial. Their resolution in the court below was based on state statutes timely and properly challenged as facially unconstitutional. This Court should therefore note probable jurisdiction, or grant certiorari and set this case on its argument calendar; Appellant respectfully so petitions.

DATED: August 19, 1980.

Respectfully submitted,

QUIN DENVIR
State Public Defender

By _____
ROBERT P. APP
Deputy State Public Defender

Member of the Bar of the
Supreme Court, Counsel for
Appellant

that is obtained after that arrest is going to be suppressible, before we go further from there in the evidence.

The testimony is slightly in conflict perhaps with regard to what happens in the living room and Lisa Bullwinkle. What is clear is that we do not have any Miranda warnings.

Lisa Bullwinkle testifies and it is confirmed by the other witness who was present in the room, Mr. Burch, that she was asked about one, "Where are the checks?" and two, to go get them.

The officer's testimony, Officer Alpert says no, "I didn't say that."

Officer Watson says both in the testimony in the preliminary hearing transcript and in the testimony for this Court that he does not remember whether or not Officer Alpert or he himself asked those questions of Lisa Bullwinkle. He does not deny that they were asked. So there is no conflict in the sense that both officers have taken diametrically opposed positions to Lisa Bullwinkle's as to what occurred.

I submit that if the Court believes Lisa Bullwinkle's testimony, then the inquiry was a violation under Miranda and the information obtained as a result of that inquiry, No. 1, that the checks were upstairs, would also be a violation under Miranda, and therefore, any action taken as a result of the information which is gained, that action being directing her to go get the material or in the alternative, getting it themselves, would be suppressible.

A complete review of the transcript discloses something very strange happened in that living room because

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both people are taken under arrest and for some reason which the officers couldn't explain, one of them is allowed to go upstairs.

I think the only reasonable explanation is that nobody followed her because she was doing just exactly what they told her to do, and it didn't occur to them to follow her until she got upstairs, and they heard the door closed. Otherwise she knew where she was going to go, to go upstairs to get the checks as they told her.

When you get upstairs, we have another sequence of events which took place, namely, dealing with the purse.

The sequence of events with the purse has had little changes in the testimony according to Officer Alpert. The only time that he saw the purse was when he walked in and there was a purse by the table, the nightstand.

I believe your Honor even qualified what kind of nightstand it was in the room, and he did talk about another object. But the purse he says he saw, and the next thing he knew it was coming to him from Officer Watson. He did not know who picked it up.

Officer Watson testified here in this court under cross-examination by Mr. Crowder and myself, he took the position that he wasn't sure what happened with that purse, how it was picked up. He does recall that it ended up in Officer Alpert's hands. They did not recall anything about telling Lisa Bullwinkle to pick it up, they really didn't even recall whether or not Lisa Bullwinkle ever did pick up the purse.

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Lisa Bullwinkle testified that the only reason she picked up the purse was because she was told to do so, and immediately after it was picked up, the officer who was standing right next to her and right next to the purse took it from her. And that was after she had previously given him some checks that she was instructed to get for them.

When that occurs, the purse goes to the two officers, it goes to Officer Alpert, and he retains possession.

There is no opportunity for the defendants to come anywhere near the purse for the rest of the time we are talking about, there is no immediate review of the purse for weapons, for contraband, for anything.

Instead, the purse is literally seized and taken into custody and removed from the premises. The Bullwinkles are taken downstairs. Mr. Bullwinkle is handcuffed and they leave.

After they leave the residence, sometime prior to reaching the station, there is a weapon search which turns out to be negative.

I would point out to your Honor that there was some argument during the course of the proceedings about whether or not there were any weapons in the premises, and I believe that the representation was made and the preliminary hearing transcript reflects the existence of a weapon in the room, and in fact even in the points and authorities cited by the People, they have changed that position -- there was no weapon visible, there was no indication of anybody being armed, there was nothing to indicate any need to examine or search

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anything for any weapons. And furthermore, the weapon search was not conducted until after they had left the premises. It turned out to be negative. The purse was still retained in the possession of the officers.

THE COURT: Wait a minute, let me ask you a question at that point, Mr. Treman.

Once they have opened the purse and looked in it for weapons, and they see things at that point that may very well be evidentiary in nature, once they were looking for weapons, is there any problem with them keeping the purse to themselves after they have checked for weapons? Is there anything unusual or abnormal with that?

MR. TREMAN: Your Honor, that is going to raise I think a very interesting question because the officers indicated on cross-examination by Mr. Crowder that there was nothing about what they saw in the purse that they could connect to any of the offenses for which the arrests had been conducted, other than the fact that there were checkbooks.

But there was no immediate tie-up between the checkbooks that were used to write particular checks or anything else. It is just simply that he said he saw some checkbooks.

THE COURT: That's correct.

MR. TREMAN: So my argument with regard to that would be even though he looked for weapons, he did not see anything which he knew to be evidence or contraband.

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THE COURT: If he absolutely knew that, of course that is true, but certainly didn't he have some reason to believe

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that that might be evidentiary in nature at that point? He saw some checkbooks and this was a check writing case.

MR. TREMAN: I realize that it was a check writing case and my argument would be the mere fact that he saw some checkbooks does not make it evidence of the check writing case.

THE COURT: You have stronger arguments in other areas, I am sure.

MR. TREMAN: That is the only one I can deal with on that one.

Now the argument which we are making I think is clear under Chadwick, namely, that two things have to occur, if we get through everything else, and this is a search incident to a lawful arrest. I think it is agreed that Chimel is controlling and Chadwick explains Chimel in certain situations, and that is that a search incident to a lawful arrest is permissible for certain things. It is also permissible within certain boundaries, including the fact that it has to be incident in time and location.

There are some parameters with regard to that, and it can only be conducted for certain immediate areas.

So the first question becomes, the arrest clearly takes place in the living room and the picking up of the purse upstairs without ever removing it from the house, just the mere fact that they picked it up, is incident under Chimel to the arrest.

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I submit that it is not, both in time and more importantly, in location. So without even getting the purse

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out of the house, which gets us to Chadwick, but the mere fact where they finally pick up the purse I submit is not incident under Chadwick. Moreover, the law from the Federal Constitutional standpoint is that when the police pick it up and take it into custody, such as what they did here, the reasons for the Chimel exception which allows that incident search to be conducted dissipate, because all of the reasons for it no longer exist. There is no danger to the officers: the officers have possession of the item. There is no danger that evidence is going to be destroyed: the officers have possession of the item. There is no danger that someone is going to gather means through which an escape can be conducted. And not only here do the officers take possession, but no initial review of that item is conducted upstairs in the bedroom. They wait until after they complete the business in the bedroom and go downstairs, handcuff, and leave before they even begin to look for weapons.

I think the weapon search is entirely improper. There was no reason to look for weapons. There was no danger that there was anything in that purse that could hurt those officers. And that is clearly the kind of thing that Chadwick is designed to deal with.

In fact, in Chadwick they specifically talk about the weapons problem and they talk about the exception where the police have information that the trunk or the box or whatever has a bottom or it may have been a bottom or some kind of explosives in it, that changes the situation, but absent that kind of knowledge, once the officers have possession, a

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weapon search becomes a joke. It is clear the officers were not going to give the purse back. The officer testified in fact that she could not have the purse in the car on the way to the police station.

And then when they got to the police station, the purse goes immediately to the officer's desk. So I submit that they had no right to pick up the purse, and everything picked up under Chadwick they had no right to look in it for anything. If they suspect it, if they had probable cause, they could have obtained a warrant.

Now there are other cases I have cited, at least one of them which is fairly similar dealing with the box and there is another case wherein the Federal District Court for Illinois had a situation where they conducted an arrest on a sidewalk where a man stepped out of an automobile carrying a briefcase, a little satchel briefcase like attorneys carry all the time, and made the arrest and picked that up and put the briefcase down by the corner of the building and participated for about eight or nine minutes in a procedure where they looked for two other bank robbers in the adjacent hotel building. And then after about the eight minutes they looked inside.

And the Court said, "No, you cannot do it, because once you have picked it up and once you have removed it out of the defendant's control, it is no longer incident, and if you had a reason to search it, then you should have gotten a warrant."

I think as far as what evidence falls, if your Honor accepts the arguments concerning the suppression, it is clear from the transcript that essentially all of the material

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obtained pursuant to both search warrants was obtained as a result of the information that the officers received out of the purse --

THE COURT: There is no question about that; the information they received for the second search warrants came from the information in the purse.

MR. TREMAN: Right. I would like to hit two more points on the other warrants.

One of them, the first search warrant deals with the allegations concerning being told by Officer Alpert that there was property, I think it was numerous cameras in the first bedroom.

THE COURT: Yes, I saw that. There is no evidence to indicate that he saw numerous cameras, there was no testimony to that effect.

MR. TREMAN: In fact, the return on the search warrant which is, I believe, before your Honor as part of the evidence makes it clear from the bedroom we are talking about, they didn't obtain numerous cameras. The best we ever had is a closed case that somebody said had a camera or some cameras in it, that's all.

Now the reason why I think that is critical to the first search warrant is that again, going through the mistake in fact analysis, if it is excised --

THE COURT: In that particular case, if it is excised, it is really frankly irrelevant. There was so much other material, that that part was very small. If you get to the point where it was intentional, that is another story.

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did not.

MR. McKINLEY: She admits closing the bedroom door, the bedroom that the preliminary hearing transcript contains testimony by Detective Rogers where he locat-d -- and here it is a fact -- numerous pieces of stolen camera equipment and a host of other things. That room was awash with stolen property. That I submit is reason enough for Lisa to go upstairs and close the door. That is all the justification anyone would need.

THE COURT: Let us talk about the purse which is what this whole thing turns on, isn't it?

MR. McKINLEY: That is what I think it does, depending on who you believe. I am saying defendant is the person that has something to gain by, eight months later, seven and a half months later, deciding that this is what was said. But that day, Rogers reduced to affidavit form what the officers told him about the purse, and that is consistent with the testimony by all three of them in court, namely, that it was not a direction, "Get your purse so we can seize it." It was saying, "Do you want to take your purse or not?' and that being the case, I think it dovetails into the cases that Mr. Franklin and I cited. A purse is an item -- well, let me get the right phrase here -- if it is any item, a purse is something that is immediately associated with the person, just like you say a woman's purse or a man's purse or whatever. If that item isn't
224 immediately associated with a person, I don't see what is.

THE COURT: The question is how did she get ahold of it?

MR. McKINLEY: That's right.

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THE COURT: I am assuming for a second that we believe the officers and that there is no question that the officers took ahold, assuming that Lisa Bullwinkle picked it up, they immediately took possession of it. Is there any argument about that, Mr. McKinley?

MR. McKINLEY: I think that is a fair reading of the facts.

THE COURT: And they kept it. Now according to the cases that were cited by Mr. Treman, he indicates that they should have had a warrant to do that; once they have got it into their possession, they should have gotten a warrant, once they have the purse in their possession, they should have had a warrant to open it because it was no longer a question of weapons or a weapon search or anything like that.

MR. McKINLEY: That point I believe has been adequately briefed. There are three separate justifications for the search of the purse.

THE COURT: Do you wish to add anything else, Mr. McKinley?

MR. McKINLEY: No, your Honor.

THE COURT: Gentlemen, I am going to read back some of this material again one more time. Whatever happens, this is the kind that somebody ought to and perhaps three judges someplace will rule on it no matter what I rule. It is a very significant case and one that maybe somebody can make some clarifying law on. I doubt it.

225 MR. TREMAN: Your Honor, I did not get a chance to do my bank argument. I would like to state it for my argument, I want to throw in my bank argument because I think it is my

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SANTA BARBARA

DATE: October 17, 1978 TIME: 2:00 P.M.

Honorable BRUCE W. DODDS JUDGE
Mary Lou Armstrong Deputy County Clerk
- - - Deputy Sheriff
- - - Court Reporter

Dept. 1

P	V
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AP	

Present:

THE PEOPLE OF THE STATE OF CALIFORNIA

District Attorney

No. 122272 vs.

EDWARD JOHN BULLWINKLE, III, and
LISA C. BULLWINKLE,
Defendants.

NATURE OF PROCEEDINGS: RULING ON SUBMISSION

The Court having taken the motions pursuant to Penal Code Sections 995 and 1538.5 under submission after hearing evidence and arguments, now rules that both motions as to both defendants are denied.

COPIES TO: District Attorney
M. Treman, Attorney at Law
J. Crowder, Deputy Public Defender
(Served in open court on October 18, 1978)

HOWARD C. MENZEL, County Clerk By Mary Lou Armstrong
Deputy Clerk

Entered 10-17-78

CL-12 (Rev. 6/76) CRIMINAL MINUTES

00514

EXHIBIT B

Los Angeles, Cal. SEP 6 - 1979 19

TITLE { People / Bullwinkle } No. 33763

THE COURT:

Motion for summary reversal and/or expedited argument, or alternatively for release on own recognizance denied without prejudice to appellant's seeking bail on appeal or release on own recognizance from trial court. This order shall not be interpreted as an expression of our views on how the trial court should act.

CLAY ROBBINS, *Clerk*

D. ...

EXHIBIT C

QUIN DENVIR
State Public Defender

ROBERT P. APP
Deputy State Public Defender

107 South Broadway, Suite 9111
Los Angeles, California 90012
Telephone: (213)620-5422

Attorneys for Defendant and Appellant

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SANTA BARBARA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, v. LISA BULLWINKLE, Defendant and Appellant.	No. A122272 2d Crim. 33763 ORDER FOR RELEASE ON BAIL PENDING APPEAL

Upon order of the Court and for good cause shown Bail on Appeal is hereby granted and bail is set in the amount of Six Thousand (6000) Dollars, and upon the satisfactory posting of said bail the defendant LISA BULLWINKLE is ordered released subject to further order of this Court.

DATED: SEP [illegible] 1993

CHARLES S. STEVENS, JR.
JUDGE OF THE SUPERIOR COURT

EXHIBIT D

ORDER

The Court having read and considered the motion of appellant EDWARD JOHN BULLWINKLE, III to consolidate case number 2nd Crim. 34931 with case number 2nd Crim 33763; the points and authorities and the declaration in support thereof; ~~any opposition thereto~~; and ~~the time for filing opposition having expired~~, there being good cause:

IT IS HEREBY ORDERED THAT: The case entitled PEOPLE vs EDWARD JOHN BULLWINKLE III, case number 2nd Crim 34931 is hereby consolidated with the case entitled PEOPLE vs LISA BULLWINKLE, case number 2nd. Crim. 33763, and

IT IS FURTHER ORDERED THAT any further papers filed in either case should contain both captions and should reflect that the cases are consolidated.

DATED: 8/24/79

PRESIDING JUSTICE
SECOND APPELLATE DISTRICT

J.

CLA... ...erk

Deputy Clerk

EXHIBIT E

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. LISA BULLWINKLE, Defendant and Appellant.	2d Crim. No. 33763 (Sta. Barbara Sup.Ct. No. 122272) (CONSOLIDATED ON APPEAL)
THE PEOPLE, Plaintiff and Respondent, v. EDWARD JOHN BULLWINKLE, JR., Defendant and Appellant.	2d Crim. No. 34931 (Sta. Barbara Sup.Ct. No. 122272)

COURT OF APPEAL-SECOND DIST.
FILED
APR 24 1980
CLA[illegible]SINS, JR. Clerk
Deputy Clerk

APPEALS from judgments of the Superior Court of Santa Barbara County. Bruce W. Dodds and John T. Rickard, Judges. Affirmed with directions.

Quin Denvir, State Public Defender, Charles M. Sevilla, Chief Assistant State Public Defender, Robert P. App, Deputy State Public Defender; and Michael J. Treman, under appointment by the Court of Appeal, for Defendants and Appellants.

George Deukmejian, Attorney General, Robert H. Philibosian, Chief Assistant Attorney General, Criminal Division, S. Clark Moore, Assistant Attorney General, John R. Gorey and Sandy R. Kriegler, Deputy Attorneys General, for Plaintiff and Respondent.

EXHIBIT F

Appellants Lisa and Edward Bullwinkle were charged jointly and individually on a total of 15 counts of burglary, receiving stolen property, and writing checks with insufficient funds. (Pen. Code, §§ 459, 496, 476a.) Following denial of their motions under Penal Code sections 995 and 1538.5, Lisa pled guilty to four counts of receiving stolen property and was sentenced to state prison. Edward pled guilty to two counts of receiving stolen property and by jury trial was convicted of two additional counts of receiving stolen property and one count of burglary, and was sentenced to state prison.

The primary issue on both appeals is the legality of a search of Lisa's purse after she was arrested for writing checks with insufficient funds, which search led to the obtaining of the evidence of stolen property involved in both appellants' convictions. Edward separately raises issues as to his motion for new trial and his sentence.

EXHIBIT F

The motion under Penal Code section 1538.5 was based on the transcript of the preliminary hearing and additional testimony. On appeal we must view the evidence at the preliminary hearing and section 1538.5 hearing in the light most favorable to the trial court's ruling, resolving all conflicts in the evidence in favor of the judgment. (People v. Lawler, 9 Cal.3d 156, 160; People v. West, 3 Cal.3d 595, 602.) Stated in this light, the facts surrounding the search are as follows: On March 3, 1978, Santa Barbara Police Officers Watson and Alpert arrested appellants at their home on an arrest warrant for writing checks with insufficient funds. Appellants were arrested in the living room. Lisa desired to go upstairs to the bedroom to get some clothing to take with her to jail, and was permitted to do so. Upon being asked whether she wished to take her purse, she reached down to the floor and picked it up. Then she handed it to Officer Watson or he took it from her. Watson handed the purse to Alpert.

EXHIBIT F

Officer Alpert checked the purse for weapons and happened to observe checkbooks inside, but did not otherwise search it at this time. The officers kept the purse in their possession while appellants were transported to the police department.

After arriving at the police department, Officer Alpert emptied the purse onto his desk and searched through the contents. He was looking for evidence relevant to the check writing charges for which appellants were arrested, such as checks, checkbooks, and identification papers.

At that moment, Officer Rogers of the burglary detail passed by, and upon observing a photograph of Edward among the contents of the purse, recognized Edward as resembling an artist's composite drawing of a suspect he was investigating for burglary of a photographic equipment store, as well as other crimes. He commented on this to Officer Alpert, who then pointed out that the purse contained papers with lists of cameras and their serial numbers. Upon

EXHIBIT F

verifying that the listed items were among the property stolen from the photographic equipment store and comparing the artist's composite drawing of the burglary suspect, Officer Rogers obtained a search warrant for the search of appellants' house, which resulted in the seizure of numerous items of stolen property leading to the convictions in the instant case.

SEARCH OF PURSE

Appellants contend that the search of the contents of Lisa's purse at the police station was unlawful because it was conducted without a warrant. Appellants point out that the police took custody of the purse at appellants' house, and they argue that once the purse had been reduced to the exclusive control of the police there was no danger that Lisa could destroy evidence in it or seize a weapon from it and that therefore no justification existed for dispensing with the requirement of a warrant. They

cite such cases as United States v. Chadwick, 433 U.S. 1, 15; Arkansas v. Sanders, ___ U.S. ___; 61 L.Ed.2d 235, 245; People v. Minjares, 24 Cal.3d 410, 420-423; People v. Dalton, 24 Cal.3d 850, 855-856; and People v. Pace, 92 Cal.App.3d 199, 202-204.

These cases are inapplicable here, because Lisa was under arrest for a felony and her purse would properly have been subject to search in the course of booking her into the jail. It has long been the rule that the police may search the person and the effects of a prisoner who is to be booked into jail, in order to prevent the introduction of contraband or weapons into the jail and in order to account for and safeguard the property taken from the prisoner. (United States v. Edwards, 415 U.S. 800, 804-805 & fn. 6, 807; People v. Ross, 67 Cal.2d 64, 70 [reversed on other grounds sub nom. Ross v. California, 391 U.S. 470]; People v. Maher, 17 Cal.3d 196, 200-201; People v. Rogers, 241 Cal.App.2d 384, 389; People v. Superior Court (Murray), 30 Cal.App.3d 257, 263; People v. Balassy, 30 Cal.App.3d 614, 623; People v. Gilliam, 41 Cal.App.3d 181, 189; People v. Remiro, 89 Cal.App.3d 809, 835; Pen. Code, § 1412; Gov. Code, § 26640.)

EXHIBIT F

Where it is shown that a suspect would have been jailed and thus subject to a booking search, the fact that a thorough search of the booking type occurs prior to the actual booking process does not render the search illegal, since no additional or greater intrusion on the privacy of the suspect is involved. (People v. Barajas, 81 Cal. App.3d 999, 1008-1009; People v. Flores, 100 Cal. App.3d 221, 229-230; see People v. Superior Court (Simon), 7 Cal.3d 186, 208-209; People v. Longwill, 14 Cal.3d 943, 948; People v. Brown, 88 Cal.App.3d 283, 293.)

In cases where the police have available some statutory alternative to jailing the suspect, as with certain Vehicle Code violations, misdemeanors (see Pen. Code, § 853.6), or intoxication (see Pen. Code, § 849, subd. (b)(2), (3)), the validity of a so-called "accelerated" booking search will depend upon a factual showing by the People that the suspect would have been subjected to the booking process. (People v. Barajas, supra, 81 Cal.App.3d at p. 1009.)

EXHIBIT F

But that is not the case in felony arrests, where jailing is the normal result. (Id., at pp. 1009-1010; see also People v. Flores, supra, at p. 230.) Here, Lisa was under arrest for writing checks with insufficient funds, a felony,[1/] and no further showing that she would have been subjected to booking is necessary. (People v. Barajas, supra.)

Appellants contend that assuming Lisa would have been jailed, a booking search should be limited to a search of her person and items worn on her person, and should not extend to her purse, because theoretically the purse could have been kept out of jail facilities without being opened. There is no merit to this argument. Booking searches have traditionally been thought to extend to a purse (see People v. Rhodes, 23 Cal.App.3d 257, 258; People v. Blatt, 23 Cal.App.3d 148, 152; People v. Brown, supra, 88 Cal.App.3d 283, 293), as well as a wallet (see People v. Balassy, supra, 30 Cal.App.3d 614, 623; People

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1. Violation of Penal Code section 476a is punishable alternatively as a misdemeanor or a felony. So far as the police were concerned, it was a felony, since none of the events which could render it a misdemeanor was subject to police discretion. (Pen. Code, § 18, subd. (b).)

EXHIBIT F

v. Tennessee, 4 Cal.App.3d 788, 792). Appellants' argument overlooks the fact that the purposes of a booking search include not only to prevent contraband and weapons from entering the jail, but also to account for the valuables and other property of the prisoner, which the police are mandated by statute to do. (Pen. Code, § 1412; Gov. Code, § 26640.)[2/] Such a search is not like the inventory of the contents of an automobile disapproved in Mozzetti v. Superior Court, 4 Cal.3d 699, 708-710. The duty to account for

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2. Penal Code section 1412 provides:

" When money or other property is taken from a defendant, arrested upon a charge of a public offense, the officer taking it must at the time give duplicate receipts therefor, specifying particularly the amount of money or the kind of property taken; one of which receipts he must deliver to the defendant and the other of which he must forthwith file with the clerk of the court to which the depositions and statement are to be sent. When such property is taken by a police-officer of any incorporated city or town, he must deliver one of the receipts to the defendant, and one, with the property, at once to the clerk or other person in charge of the police-office in such city or town. "

Government Code section 26640 provides:

"The sheriff shall take charge of, safely keep, and keep a correct account of, all money and valuables found on each prisoner when delivered at the county jail. Except when otherwise ordered by a court of competent jurisdiction, the sheriff shall pay such money or sums therefrom and deliver such valuables or portions thereof as the prisoner directs and shall pay and deliver all the remainder of his money and valuables to the prisoner or to his order upon his release from the jail or to his legal representative in case of his death or insanity."

EXHIBIT F

the valuables and property taken from a prisoner upon jailing is specifically mandated by statute, and appears to be greater than the duty of slight care or ordinary care which Mozzetti held was owed toward impounded automobiles. A purse is precisely the place where the money and valuables contemplated by the statutes would normally be found. Viewing the facts most favorably to the judgment, Lisa, knowing that she was about to be taken to jail, chose to take her purse. She had no reasonable expectation that she could take it to jail without its contents being examined. Moreover, purses and wallets are entirely different from automobiles. The contents of automobiles "may be readily and adequately protected by locking the vehicle." (Mozzetti v. Superior Court, supra, 4 Cal.3d at p. 709.) The contents of purses and wallets, on the other hand, are easily susceptible to theft since purses and wallets cannot normally be locked. (People v. Morton, 21 Cal.App.3d 172, 175, distinguishing Mozzetti.) While it would be difficult to steal the contents of a locked automobile, the contents of a purse could easily be taken or lost, even

EXHIBIT F

en route from the booking area to a property room or locker. The inventorying of a prisoner's valuables and effects has always been thought one of the proper purposes of a booking search, both before and after Mozzetti. (People v. Maher, supra, 17 Cal.3d 196, 200-201.) Appellants' argument that the governmental interests in preserving the contents of the purse can be satisfied by placing the purse unopened into some kind of property room or property locker is not persuasive.

Appellants argue that the People's accelerated booking-search theory was not articulated in the trial court and may not be urged for the first time on appeal, citing People v. Superior Court (Simons), supra, 7 Cal.3d 186, 198; People v. Miller, 7 Cal.3d 219, 227; Mestas v. Superior Court, 7 Cal.3d 537, 542, and Agar v. Superior Court, 21 Cal.App.3d 24, 28-29. However, in this case appellants are not prejudiced by the People's failure to articulate this theory below. The purpose of the rule preventing the People from relying upon a new theory on appeal in the above cases is to give the defendant a

EXHIBIT F

fair opportunity to cross-examine prosecution witnesses and to adduce evidence of his own to rebut the new theory. (People v. Sirhan, 7 Cal.3d 710, 736-737.) In the cases cited by appellants the People had failed to establish in the trial court that as a factual matter the police officer entertained a belief that a crime other than the one for which the defendant was arrested had also been committed.

Here, on the other hand, the validity of an accelerated booking search does not depend upon facts which might have been contested had the matter been raised earlier. Since Lisa's arrest was for a felony, no factual showing that she actually would have been booked is involved. (People v. Barajas, supra, 81 Cal.App.3d 999, 1009-1010.) Unlike the cases cited by appellants, the validity of an accelerated booking search does not require the police officer's subjective belief that he is actually conducting a booking search, nor would it be negatived by the officer's express concession, as in this case, that he was not conducting a booking search. The theory is that the privacy of the prisoner and her effects would have been invaded anyway, and that therefore no greater intrusion on that privacy occurs when the search is conducted

EXHIBIT F

other than during the booking process. Finally, the validity of a booking search of this type should not hinge upon distinctions as to the particular facilities for prisoner-property storage at particular police stations or jails. As we have discussed, the statutory duties imposed upon the police to account for and safeguard a prisoner's property, and the easy susceptibility of a purse to theft of its contents, justify inventorying its contents even in stations where individual property lockers might be available.[3/] Thus we see no way in which appellants were prejudiced by the People's raising this argument on appeal. (People v. Sirhan, supra, 7 Cal.3d at p. 737.) In these circumstances, where the record shows the search was lawful, it is our duty to uphold

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3. We are aware of the recent decision in People v. Smith (Mar. 27, 1980, 1 Crim. 19411) ____ Cal.App.3d ____, but find it distinguishable. There, after the defendant's purse had been subjected to a booking search and then placed in a property locker, an officer removed the purse and conducted a second search the following day, which the People sought to uphold on a booking search theory. The court held that once a booking search had been conducted and the property placed in storage, a warrant (or additional exception to the warrant requirement) was necessary for another search. The court expressly declined to decide whether the initial booking search required a warrant.

EXHIBIT F

the trial court's ruling, even if upon a theory not articulated below. (See Cal. Const., art. VI, § 13; Pen. Code, §§ 1258, 1404; Code Civ. Proc., § 475.) 4/

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4. Appellants also contend the search was illegal on the ground that the original arrest was unlawful due to inaccuracies in the affidavit for the arrest warrants. Officer Watson concluded in his affidavit that appellants had "issued numerous checks that were returned 'NSF' or 'Account Closed.'" Appellants argue this was technically incorrect because the checks were not physically stamped "NSF" or "Account Closed" nor physically returned to the stores who were the named payees. This was because appellants had check guarantee cards from the bank. The check guarantee cards were not a credit device under which the bank extended credit to appellants for overdrafts in the accounts; rather the bank had an agreement with the merchants involved, that the bank would honor checks presented with the check guarantee cards. Therefore the bank was going to have to honor the checks in favor of the merchants. The bank, rather than the merchants, would be the ultimate victim. The facts nevertheless showed that appellants were writing checks with insufficient funds in their accounts to cover them. As the trial court found, the officer's language in the affidavit may have been technically imprecise, but this was not the type of error which requires quashing the warrant or excising information from it. Interpreted in a commonsense, rather than a hypertechnical, fashion, the affidavit supported issuance of the arrest warrant. (United States v. Ventresca, 380 U.S. 102, 108-109; People v. Mesa, 14 Cal.3d 466, 469.)

EXHIBIT F

MOTION FOR NEW TRIAL

Edward contends that the trial court erred in denying his motion for new trial based upon misconduct of a juror.

Appellants' friend Brian Burch was present at appellants' apartment when the police arrested appellants. He was called as a witness by the prosecution, but generally denied any recollection of having observed expensive photographic and electronic equipment in the apartment. In response to a question about whether appellants had a motor vehicle, Burch commented that he did not know, but that he, Burch, drove when he and appellants would go swimming at the Coral Casino, where appellants were members.

On Edward's motion for new trial it was proved by the affidavits of four jurors that one juror, in violation of her duties, went to the Coral Casino and was informed that appellants were not members but that a relative of appellants was.

EXHIBIT F

There is no dispute that the juror committed misconduct, and that misconduct by a juror creates a rebuttable presumption of prejudice. (See People v. Honeycutt, 20 Cal.3d 150, 156; People v. Pierce, 24 Cal.3d 199, 207.) However, the presumption of prejudice may be rebutted by the record. (See People v. Martinez, 82 Cal.App.3d 1, 22-25.)

In this case the trial court found the presumption of prejudice was rebutted by the record, and we agree.

As the trial court found, the testimony of Brian Burch contributed nothing to Edward's convictions. His testimony as to the Coral Casino was irrelevant to any issue in the case. The result of the juror's independent investigation was not such as to adversely affect the jurors' impartiality, lighten the prosecution's burden of proof, or contradict any asserted defense. The record shows that Edward could not have been prejudiced by the misconduct. (See People v. Martinez, supra.)

EXHIBIT F

SENTENCE

Edward was sentenced on one count of burglary and was given consecutive sentences on the remaining four counts of receiving stolen property. He contends that since the stolen property was all discovered at his apartment on the same date, he cannot be subjected to multiple punishment on the various counts of receiving stolen property, citing People v. Lyons, 50 Cal.2d 245, 275.

Under Lyons, if the evidence shows that goods stolen from different sources were received on a single occasion, there is but one offense of receiving stolen property. However, this rule is inapplicable when there is evidence from which the jury might infer that the goods were not received at the same time or in the same transaction. (People v. Roberts, 182 Cal.App.2d 431, 437.) In this case, the record reasonably supports the inference that appellant received the various stolen goods at

EXHIBIT F

different times and in different transactions. The burglaries during which the goods were stolen occurred at widely separated times. The Browne burglary occurred in May 1975. The Circon burglary occurred around December 1, 1975. The National Photo burglary involved in count VI occurred January 10, 1976. The B & K Industries burglary was in January 1978.

CREDIT ON SENTENCES

Both appellants contend they are entitled to additional credit on their sentences for good time/work time. Under the recent California Supreme Court decision in People v. Sage, 26 Cal.3d 498, 507, appellants are entitled to such conduct credit if earned.

The judgments are affirmed and the causes are remanded to the trial court for determination of the conduct credit to which appellants are entitled.

CERTIFIED FOR PUBLICATION.

ASHBY, J.

We concur:

STEPHENS, Acting P. J.

HASTINGS, J.

EXHIBIT F

MAY 21 1958

Los Angeles, Cal. _____, 19__

TITLE { People / Bullcumbee } No. 33763

PETITION FOR REHEARING DENIED.

_____

CLAY ROBBINS, Clerk

EXHIBIT G

ORDER DUE
July 23, 1980

ORDER DENYING HEARING

AFTER JUDGMENT BY THE COURT OF APPEAL

2d District, Division 5, Crim. No. 34931
33763

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

PEOPLE
v.
BULLWINKLE

PEOPLE
v.
BULLWINKLE, JR.

SUPREME COURT
FILED
JUN 25 1980
LAURENCE P. GILL, Clerk
Deputy

Appellants' petition for hearing DENIED.

The requests for an order directing non-publication of the opinion in the above entitled cause is denied.

Bird, C.J., and Mosk, J., are of the opinion that the petition for hearing should be granted.

Bird
Chief Justice

EXHIBIT H

STATE PUBLIC DEFENDER
OFFICE COPY

2d Crim. 33763

JUN 26 1980

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

Received for filing in
CLERK'S OFFICE
COURT OF APPEAL
SECOND APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. LISA BULLWINKLE, Defendant and Appellant.	2d Crim. No. 33763 (Sta. Barbara Sup. Ct. No. 122272) (CONSOLIDATED ON APPEAL)
THE PEOPLE, Plaintiff and Respondent, v. EDWARD JOHN BULLWINKLE, JR., Defendant and Appellant.	2d Crim. No. 34931 (Sta. Barbara Sup. Ct. No. 122272)

NOTICE OF APPEAL

Appellant LISA BULLWINKLE through her undersigned counsel, hereby gives notice pursuant to rule 10 of the Rules of the Supreme Court of the United States that she appeals to the Supreme Court of the United States from the decision of this court in this case filed on April 24, 1980, and from its order denying rehearing filed on May 21, 1980, which became final as to this court on May 24, 1980. Appellant's

EXHIBIT I

petition for hearing by the Supreme Court of California was denied by post card order of that Court dated June 25, 1980.

The jurisdiction of the Supreme Court of the United States to hear the questions presented herein by appeal is conferred by 28 United States Code section 1257(2); see also Prudential Ins. Co. v. Cheek (1921) 259 U.S. 530; Flournoy v. Wiener (1944) 321 U.S. 253; Mishkin v. New York (1966) 383 U.S. 502; jurisdiction by certiorari will be separately asserted and is conferred by 28 United States Code sections 1257(3) and 2103.

At Los Angeles, California, this 26th day of June, 1980.

ROBERT P. APP
Deputy State Public Defender

107 South Broadway, Suite 9111
Los Angeles, California 90012
Telephone: (213) 620-5422

Member, Bar of the Supreme
Court of the United States

For QUIN DENVIR
State Public Defender

Attorneys for Appellant
Lisa Bullwinkle

EXHIBIT I

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. LISA BULLWINKLE, Defendant and Appellant.	2d Crim. No. 33763 (Sta. Barbara Sup.Ct. No. 122272) (CONSOLIDATED ON APPEAL)
THE PEOPLE, Plaintiff and Respondent, v. EDWARD JOHN BULLWINKLE, JR., Defendant and Appellant.	2d Crim. No. 34931 (Sta. Barbara Sup.Ct. No. 122272)

NOTICE OF PENDING APPEAL

Appellant LISA BULLWINKLE hereby gives notice that she has filed in the Court of Appeal for the Second Judicial District, a Notice of Appeal to the Supreme Court of the United States in accordance with Rule 10 of the rules of that Court, a copy of which is attached hereto and incorporated herein as if fully set forth.

DATED: June 26, 1980

Respectfully submitted,

QUIN DENVIR
State Public Defender

By _____
ROBERT P. APP
Deputy State Public Defender

Attorneys for Appellant
Lisa Bullwinkle

EXHIBIT I

2d Crim. 33763

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. LISA BULLWINKLE, Defendant and Appellant.	2d Crim. No. 33763 (Sta. Barbara Sup. Ct. No. 122272) (CONSOLIDATED ON APPEAL)
THE PEOPLE, Plaintiff and Respondent, v. EDWARD JOHN BULLWINKLE, JR., Defendant and Appellant.	2d Crim. No. 34931 (Sta. Barbara Sup. Ct. No. 122272)

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At Los Angeles, California, this 26th day of June, 1980.

ROBERT P. APP
Deputy State Public Defender

107 South Broadway, Suite 9111
Los Angeles, California 90012
Telephone: (213) 620-5422

Member, Bar of the Supreme Court of the United States

For QUIN DENVIR
State Public Defender

Attorneys for Appellant
Lisa Bullwinkle

EXHIBIT I

Los Angeles, Cal. 7-10-80, 19

TITLE { The People of the State / Lisa Bullwinkle } No. 33763

S.C. # 122272

The Court:

The motion to stay or recall the remittitur and to continue bail on appeal is denied.

CLAY ROBBINS, Clerk

EXHIBIT J

Los Angeles, Cal. _____, 19____

TITLE { People v Bullwinkle / and / People v Bullwinkle } No. 33763 & 34931

REMITTITUR ISSUED.

CLAY ROBBINS, Clerk

By _____ Deputy

EXHIBIT J

§ 459. Definition

Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, railroad car, trailer coach, as defined in Section 635 of the Vehicle Code, any house car, as defined in Section 362 of the Vehicle Code, inhabited camper, as defined in Section 243 of the Vehicle Code, vehicle as defined by the Vehicle Code when the doors of such vehicle are locked, aircraft as defined by the Harbors and Navigation Code, mine or any underground portion thereof, with intent to commit grand or petit larceny or any felony is guilty of burglary. As used in this chapter, "inhabited" means currently being used for dwelling purposes, whether occupied or not.

(Enacted 1872. Amended by Code Am.1873–74, c. 56, § 1; Stats.1913, c. 144, § 1; Stats.1947, c. 1052, § 1; Stats.1977, c. 690, § 8; Stats.1978, c. 579, § 22.)

Cross References

Attempted burglary, see § 664.
Check sellers and cashers, precautions against burglary, see Financial Code § 12800.1.
Degrees of theft, see § 486 et seq.
Felony, defined, see § 17.
Fine authorized in addition to prescribed imprisonment, see § 672.
Fingerprints and identification to bureau, see § 11112.
Intent, manifestation, see § 21.
Jurisdiction, property taken into another county, see § 786.
Murder committed in perpetration of burglary, see § 189.
Possession of burglar tools, see § 466 et seq.
Probation, see § 1203.
Punishment, see § 460.
Soliciting another to commit burglary, see § 653f.
Theft, see § 484 et seq.
Word "theft" substituted for larceny, embezzlement or stealing, see § 490a.

§ 476a. Checks, drafts or orders on banks; insufficient funds; intent to defraud; punishment; presumption from protest; credit defined; partial validity

(a) Any person who for himself or as the agent or representative of another or as an officer of a corporation, willfully, with intent to defraud, makes or draws or utters or delivers any check, or draft or order upon any bank or depositary, or person, or firm, or corporation, for the payment of money, knowing at the time of such making, drawing, uttering or delivering that the maker or drawer or the corporation has not sufficient funds in, or credit with said bank or depositary, or person, or firm, or corporation, for the payment of such check, draft or order and all other checks, drafts or orders upon such funds then outstanding, in full upon its presentation, although no express representation is made with reference thereto, is punishable by imprisonment in the county jail for not more than one year, or in the state prison.

(b) However, if the total amount of all such checks, drafts, or orders that the defendant is charged with and convicted of making, drawing, or uttering does not exceed one hundred dollars ($100), the offense is punishable only by imprisonment in the county jail for not more than one year, except that this subdivision shall not be applicable if the defendant has previously been convicted of a violation of Section 470, 475, or 476 of this code, or of this section of this code, or of the crime of petty theft in a case in which defendant's offense was a violation also of Section 470, 475, or 476 of this code or of this section or if the defendant has previously been convicted of any offense under the laws of any other state or of the United States which, if committed in this state, would have been punishable as a violation of Section 470, 475, or 476 of this code or of this section of this code or if he has been so convicted of the crime of petty theft in a case in which, if defendant's offense had been committed in this state, it would have been a violation also of Section 470, 475, or 476 of this code, or of this section.

(c) Where such check, draft, or order is protested, on the ground of insufficiency of funds or credit, the notice of protest thereof shall be admissible as proof of presentation, nonpayment and protest and shall be presumptive evidence of knowledge of insufficiency of funds or credit with such bank or depositary, or person, or firm, or corporation.

(d) The word "credit" as used herein shall be construed to mean an arrangement or understanding with the bank or depositary or person or firm or corporation for the payment of such check, draft or order.

(e) If any of the preceding paragraphs, or parts thereof, shall be found unconstitutional or invalid, the remainder of this section shall not thereby be invalidated, but shall remain in full force and effect.

(Added by Stats.1907, c. 337, § 1. Amended by Stats.1915, c. 445, § 1; Stats.1919, c. 154, § 1; Stats.1929, c. 877, § 1; Stats.1955, c. 307, § 1; Stats.1955, c. 1862, § 1; Stats.1956, 1st Ex.Sess., c. 30, § 1; Stats.1967, c. 222, § 1; Stats.1963, c. 1448, § 1; Stats.1976, c. 1139, § 216.)

Cross References

Commercial paper, protest, see Commercial Code §§ 3501 to 3511.
Fictitious bill, note, or check, see § 476.
Forgery, see § 470.
Intent, manifestation, see § 21.
Intent to defraud, see § 8.
Issuance of check or other paper to circulate as money, see § 648.
Wilfully, defined, see § 7.

EXHIBIT K

§ 496. Receiving stolen property

Receiving; knowledge; concealment; punishment

1. Every person who buys or receives any property which has been stolen or which has been obtained in any manner constituting theft or extortion, knowing the property to be so stolen or obtained, or who conceals, sells, withholds or aids in concealing, selling, or withholding any such property from the owner, knowing the property to be so stolen or obtained, is punishable by imprisonment in a state prison, or in a county jail for not more than one year; provided, that where the district attorney or the grand jury determines that such action would be in the interests of justice, the district attorney or the grand jury, as the case may be, may, if the value of the property does not exceed two hundred dollars ($200), specify in the accusatory pleading that the offense shall be a misdemeanor, punishable only by imprisonment in the county jail not exceeding one year.

Secondhand dealers; inquiry; presumption

2. Every person whose principal business is dealing in or collecting used or secondhand merchandise or personal property, and every agent, employee or representative of such person, who buys or receives any property which has been stolen or obtained in any manner constituting theft or extortion, under such circumstances as should cause such person, agent, employee or representative to make reasonable inquiry to ascertain that the person from whom such property was bought or received had the legal right to sell or deliver it, without making such reasonable inquiry, shall be presumed to have bought or received such property knowing it to have been so stolen or obtained. This presumption may, however, be rebutted by proof.

Secondhand dealers; inquiry; burden of proof

3. When in a prosecution under this section it shall appear from the evidence that the defendant's principal business was as set forth in the preceding paragraph, that the defendant bought, received, or otherwise obtained, or concealed, withheld or aided in concealing or withholding from the owner, any property which had been stolen or obtained in any manner constituting theft or extortion, and that the defendant bought, received, obtained, concealed or withheld such property under such circumstances as should have caused him to make reasonable inquiry to ascertain that the person from whom he bought, received, or obtained such property had the legal right to sell or deliver it to him, then the burden shall be upon the defendant to show that before so buying, receiving, or otherwise obtaining such property, he made such reasonable inquiry to ascertain that the person so selling or delivering the same to him had the legal right to so sell or deliver it.

Damages and costs

4. Any person who has been injured by a violation of paragraph 1 of this section may bring an action for three times the amount of actual damages, if any, sustained by the plaintiff, costs of suit and reasonable attorney's fees.

(Formerly § 496bb, added by Stats.1935, c. 434, § 1. Renumbered § 496 and amended by Stats.1961, c. 97, § 2; Stats.1959, c. 734, § 1; Stats.1963, c. 1606, § 1; Stats.1968, c. 1085, § 1; Stats.1972, c. 963, § 1; Stats.1976, c. 1139, § 234.)

Former § 496 was repealed by Stats.1961, c. 97, § 1.

Cross References

Advertisement of second hand merchandise, see Business and Professions Code § 17531.
Junk, metal, etc., purchased from or pledged by minor, see § 501.
Pawnbrokers, see §§ 343, 344.
Possession of articles from which manufacturer's identification mark has been removed, see § 537e.
Purchases by junk and second hand dealers, see § 496a.
Purchases by second hand book dealers, see § 496b.
Secondhand,
Builders' tools, see Business and Professions Code § 21560 et seq.
Junk, see Business and Professions Code § 21600 et seq.
Watches, see Business and Professions Code § 21500 et seq.

EXHIBIT K

§ 1538.5. Motion to return property or suppress evidence

Grounds

(a) A defendant may move for the return of property or to suppress as evidence any tangible or intangible thing obtained as a result of a search or seizure on either of the following grounds:

(1) The search or seizure without a warrant was unreasonable.

(2) The search or seizure with a warrant was unreasonable because (i) the warrant is insufficient on its face; (ii) the property or evidence obtained is not that described in the warrant; (iii) there was not probable cause for the issuance of the warrant; (iv) the method of execution of the warrant violated federal or state constitutional standards; (v) there was any other violation of federal or state constitutional standards.

First hearing

(b) When consistent with the procedures set forth in this section and subject to the provisions of Section 170 through 170.6 of the Code of Civil Procedure, the motion should first be heard by the magistrate who issued the search warrant if there is a warrant.

Evidence

(c) Whenever a search or seizure motion is made in the municipal, justice or superior court as provided in this section, the judge or magistrate shall receive evidence on any issue of fact necessary to determine the motion.

Effect of granting motion

(d) If a search or seizure motion is granted pursuant to the proceedings authorized by this section, the property or evidence shall not be admissible against the movant at any trial or other hearing unless further proceedings authorized by this section or Section 1238 or Section 1466 are utilized by the people.

Return of property

(e) If a search or seizure motion is granted at a trial, the property shall be returned upon order of the court unless it is otherwise subject to lawful detention. If the motion is granted at a special hearing, the property shall be returned upon order of the court only if, after the conclusion of any further proceedings authorized by this section or Section 1238 or Section 1466, the property is not subject to lawful detention or if the time for initiating such proceedings has expired, whichever occurs last. If the motion is granted at a preliminary hearing, the property shall be returned upon order of court after 10 days unless the property is otherwise subject to lawful detention or unless, within that time, further proceedings authorized by this section or Section 1238 are utilized; if they are utilized, the property shall be returned only if, after the conclusion of such proceedings, the property is no longer subject to lawful detention.

Felony; motion at preliminary hearing

(f) If the property or evidence relates to a felony offense initiated by a complaint, the motion may be made in the municipal or justice court at the preliminary hearing.

Misdemeanor; pre-trial motion at special hearing

(g) If the property or evidence relates to a misdemeanor complaint, the motion shall be made in the municipal or justice court before trial and heard prior to trial at a special hearing relating to the validity of the search or seizure. If the property or evidence relates to a misdemeanor filed together with a felony, the procedure provided for a felony in this section and Sections 1238 and 1539 shall be applicable.

Motion at trial

(h) If, prior to the trial of a felony or misdemeanor, opportunity for this motion did not exist or the defendant was not aware of the grounds for the motion, the defendant shall have the right to make this motion during the course of trial in the municipal, justice or superior court.

Felony; renewal of motion at special hearing; review

(i) If the property or evidence obtained relates to a felony offense initiated by complaint and the defendant was held to answer at the preliminary hearing, or if the property or evidence relates to a felony offense initiated by indictment, the defendant shall have the right to renew or make the motion in the superior court at a special hearing relating to the validity of the search or seizure which shall be heard prior to trial and at least 10 days after notice to the people unless the people are willing to waive a portion of this time. The defendant shall have the right to litigate the validity of a search or seizure de novo on the basis of the evidence presented at a special hearing. After the special hearing is held in the superior court, any review thereafter desired by the

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defendant prior to trial shall be by means of an extraordinary writ of mandate or prohibition filed within 30 days after the denial of his motion at the special hearing.

Relitigation of question after grant of motion; new evidence; review

(j) If the property or evidence relates to a felony offense initiated by complaint and the defendant's motion for the return of the property or suppression of the evidence at the preliminary hearing is granted, and if the defendant is not held to answer at the preliminary hearing, the people may file a new complaint or seek an indictment after the preliminary hearing, and the ruling at the prior hearing shall not be binding in any subsequent proceeding. If the property or evidence relates to a felony offense initiated by complaint and the defendant's motion for the return or suppression of the property or evidence at the preliminary hearing is granted, and if the defendant is held to answer at the preliminary hearing, the ruling at the preliminary hearing shall be binding upon the people unless, upon notice to the defendant and the court in which the preliminary hearing was held and upon the filing of an information, the people within 15 days after the preliminary hearing request in the superior court a special hearing, in which case the validity of the search or seizure shall be relitigated de novo on the basis of the evidence presented at the special hearing, and the defendant shall be entitled, as a matter of right, to a continuance of the special hearing for a period of time up to 30 days. If defendant's motion is granted at a special hearing in the superior court, the people, if they have additional evidence relating to the motion and not presented at the special hearing, shall have the right to show good cause at the trial why such evidence was not presented at the special hearing and why the prior ruling at the special hearing should not be binding, or the people may seek appellate review as provided in subdivision (*o*), unless the court prior to the time such review is sought has dismissed the case pursuant to Section 1385. If the property or evidence seized relates solely to a misdemeanor complaint, and the defendant made a motion for the return of property or the suppression of evidence in the municipal court or justice court prior to trial, both the people and defendant shall have the right to appeal any decision of that court relating to that motion to the superior court of the county in which such inferior court is located, in accordance with the California Rules of Court provisions governing appeals from municipal and justice courts in criminal cases. If the people prosecute review by appeal or writ to decision, or any review thereof, in a felony or misdemeanor case, it shall be binding upon them.

Release of defendant pending resumption of proceedings in trial court

(k) If the defendant's motion to return property or suppress evidence is granted and the case is dismissed pursuant to Section 1385, or the people appeal in a misdemeanor case pursuant to subdivision (j), the defendant shall be released pursuant to Section 1318 if he is in custody and not returned to custody unless the proceedings are resumed in the trial court and he is lawfully ordered by the court to be returned to custody.

If the defendant's motion to return property or suppress evidence is granted and the people file a petition for writ of mandate or prohibition pursuant to subdivision (*o*) or a notice of intention to file such a petition, the defendant shall be released pursuant to Section 1318 unless (1) he is charged with a capital offense in a case where the proof is evident and the presumption great, or (2) he is charged with a noncapital offense defined in Chapter 1 (commencing with Section 187) of Title 8 of Part 1 and the court orders that the defendant be discharged from actual custody upon bail.

Stay; time for trial; dismissal; continuance; bail or release

(*l*) If the defendant's motion to return property or suppress evidence is granted, the trial of a criminal case shall be stayed to a specified date pending the termination in the appellate courts of this state of the proceedings provided for in this section, Section 1238, or Section 1466 and, except upon stipulation of the parties, pending the time for the initiation of such proceedings. Upon the termination of such proceedings, the defendant shall be brought to trial as provided by Section 1382, and subject to the provisions of Section 1382, whenever the people have sought and been denied appellate review pursuant to subdivision (*o*), the defendant shall be entitled to have the action dismissed if he is not brought to trial within 30 days of the date of the order which is the last denial of the petition. Nothing contained in this subdivision shall prohibit a court, at the same time as it rules upon the search and seizure motion, from dismissing a case pursuant to Section 1385 when such dismissal is upon the court's own motion and is based upon an order at the special hearing granting defend-

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ant's motion to return property or suppress evidence. In a misdemeanor case, the defendant shall be entitled to a continuance of up to 30 days if he intends to file a motion to return property or suppress evidence and needs this time to prepare for the special hearing on the motion. In case of an appeal by the defendant in a misdemeanor case from the denial of such motion, he shall be entitled to bail as a matter of right, and, in the discretion of the trial or appellate court, may be released on his own recognizance pursuant to Section 1318.4.

Exclusive pre-trial remedy; review on appeal after conviction

(m) The proceedings provided for in this section, Section 995, Section 1238, and Section 1466 shall constitute the sole and exclusive remedies prior to conviction to test the unreasonableness of a search or seizure where the person making the motion for the return of property or the suppression of evidence is a defendant in a criminal case and the property or thing has been offered or will be offered as evidence against him. A defendant may seek further review of the validity of a search or seizure on appeal from a conviction in a criminal case notwithstanding the fact that such judgment of conviction is predicated upon a plea of guilty. Such review on appeal may be obtained by the defendant providing that at some stage of the proceedings prior to conviction he has moved for the return of property or the suppression of the evidence.

Motions on other grounds; existing law and procedure

(n) Nothing contained in this section shall prohibit a person from making a motion, otherwise permitted by law, to return property, brought on the ground that the property obtained is protected by the free speech and press provisions of the Federal and State Constitutions. Nothing in this section shall be construed as altering (i) the law of standing to raise the issue of an unreasonable search or seizure; (ii) the law relating to the status of the person conducting the search or seizure; (iii) the law relating to the burden of proof regarding the search or seizure; (iv) the law relating to the reasonableness of a search or seizure regardless of any warrant which may have been utilized; or (v) the procedure and law relating to a motion made pursuant to Section 995 or the procedures which may be initiated after the granting or denial of such a motion.

People's petition for mandate or prohibition; notice of intention

(o) Within 30 days after a defendant's motion is granted at a special hearing in the superior court, the people may file a petition for writ of mandate or prohibition, seeking appellate review of the ruling regarding the search or seizure motion. If the trial of a criminal case is set for a date which is less than 30 days from the granting of a defendant's motion at a special hearing in the superior court, the people, if they have not filed such a petition and wish to preserve their right to file such a petition, shall file in the superior court on or before the trial date or within 10 days after the special hearing, whichever occurs last, a notice of intention to file such a petition and shall serve a copy of the notice upon the defendant.

(Added by Stats.1967, c. 1537, § 1. Amended by Stats.1970, c. 1289, § 2; Stats.1970, c. 1441, § 1.5; Stats.1977, c. 127, § 1.)

EXHIBIT L

§ 815a. Warrant; endorsement of amount of bail

At the time of issuing a warrant of arrest, the magistrate shall fix the amount of bail which in his judgment in accordance with the provisions of Section 1275 will be reasonable and sufficient for the appearance of the defendant following his arrest, if the offense is bailable, and said magistrate shall endorse upon said warrant a statement signed by him, with the name of his office, dated at the county, city or town where it is made to the following effect "The defendant is to be admitted to bail in the sum of _____ dollars" (stating the amount).

(Added by Stats.1933, c. 242, § 1.)

Cross References

Arrest by bail or depositor for purpose of surrender, see § 1301.
Bail,
  Acceptance, see § 1269b.
  Admission, see § 1268.
  Bailable offenses, see § 1271.
  Defined, see Civil Code § 2780.
  Licenses, see Insurance Code § 1800 et seq.
  Magistrates having power to allow, see § 1277.
  Nonbailable offenses, see § 1270.
  Order admitting defendant to bail in amount specified in this section, see § 1269a.
  Taking, see § 1269.
Motorboat violations, bail, see Harbors and Navigation Code § 664.
Penalty assessments on forfeiture of bail, determination on endorsement, see § 13521.
Release on own recognizance, see § 1318 et seq.

§ 1269b. Acceptance of bail; notice of appearance of prisoner; schedule of bail; discharge of prisoner; disposition of bail; forfeiture

(a) The officer in charge of a jail wherein an arrested person is held in custody, an officer of a sheriff's department or police department of a city who is in charge of a jail or employed at a fixed police or sheriff's facility and is acting under an agreement with the agency which keeps the jail wherein an arrested person is held in custody, an employee of a sheriff's department or police department of a city who is assigned by such department to collect bail, the clerk of the justice or municipal court of the judicial district in which the offense was alleged to have been committed, and the clerk of the superior court in which the case against the defendant is pending shall have authority to approve and accept bail in such amount as fixed by the warrant of arrest or schedule of bail or order admitting to bail in cash or surety bond executed by a certified, admitted surety insurer as provided in the Insurance Code, to issue and sign an order for the release of the arrested person, and to set a time and place for the appearance of the arrested person before the appropriate court and give notice thereof.

(b) If a defendant has appeared before a judge of the court on the charge contained in the complaint, indictment, or information the bail shall be in the amount fixed by such judge at the time of such appearance; if no such appearance has been made, the bail shall be in the amount fixed in the warrant of arrest or, if no warrant of arrest has been issued, the amount of bail shall be pursuant to the uniform countywide schedule of bail for the county in which the defendant must appear, previously fixed and approved as provided in subdivisions (c) and (d).

(c) It is the duty of the superior, municipal and justice court judges in each county to prepare, adopt, and from time to time revise, by a majority vote, at a meeting called by the presiding judge of the superior court of the county, a uniform countywide schedule of bail for all bailable felony offenses.

(d) It is the duty of the municipal and justice court judges in each county to prepare, adopt, and from time to time revise, by a majority vote, at a meeting called by the presiding judge of the municipal court or the senior judge of the justice court at each county seat, a uniform, countywide schedule of bail for all misdemeanor and infraction offenses.

(e) Each countywide bail schedule shall contain a list of such offenses and the amounts of bail applicable thereto as the judges determine to be appropriate. If the schedules do not list all offenses specifically, they shall contain a general clause for designated amounts of bail as the judges of the county determined to be appropriate for all such offenses not specifically listed in the schedules. A copy of the countywide bail schedule shall be sent to the officer in charge of the county jail, to the officer in charge of each city jail within the county, to each superior, municipal and justice court judge and commissioner in the county, and to the Judicial Council.

(f) Upon posting such bail the defendant or arrested person shall be discharged from custody as to the offense on which the bail is posted.

All money and surety bonds so deposited with an officer authorized to receive bail shall be transmitted immediately to the judge or clerk of the court by which the order was made or warrant issued or bail schedule fixed. If, in the case of felonies, an indictment is filed, such judge or clerk of the court shall transmit all such money and surety bonds to the county clerk.

(g) If a defendant or arrested person so released fails to appear at the time and in the court so ordered upon his release from custody, the provisions of Sections 1305 and 1306 shall apply.

(Added by Stats.1945, c. 363, § 1. Amended by Stats.1951, c. 1608, § 29; Stats.1955, c. 808, § 1; Stats.1955, c. 1348, § 2; Stats.1957, c. 2324, § 1; Stats.1959, c. 527, § 1; Stats.1959, c. 715, § 1; Stats.1959, c. 1396, § 1; Stats.1965, c. 138, § 2; Stats.1965, c. 645, § 2; Stats.1969, c. 9, § 2; Stats.1970, c. 936, § 1; Stats.1971, c. 195, § 1; Stats.1973, c. 810, § 1; Stats.1975, c. 672, § 1; Stats.1976, c. 1079, § 55; Stats.1976, c. 808, § 1; Stats.1977, c. 579, § 150; Stats.1977, c. 1257, § 121.)

Cross References

Bail licenses, see Insurance Code § 1800 et seq.
Compliance with warrant on making arrest, see § 848.
Definitions,
  Arrest, see § 834.
  Misdemeanor, see § 17.
  Surety insurance, see Insurance Code § 105.
Endorsement of amount of bail on warrant by magistrate, see § 815a.
Surety insurers, see Insurance Code § 12000 et seq.
Warrant of arrest, generally, see § 813 et seq.

EXHIBIT M

Rule 24. Decision of Reviewing Court

(a) [When decisions become final] All decisions of the reviewing courts shall be filed with the clerk, who shall forthwith transmit a copy of the opinion to the lower court or tribunal and to the parties. A decision of the Supreme Court becomes final 30 days after filing unless the court orders a shorter time or, prior to the expiration of the 30 day period or any extension thereof, orders one or more additional periods of time not to exceed a total of 60 additional days. A decision of a Court of Appeal becomes final as to that court 30 days after filing, except that the decision becomes final as to that court immediately after filing upon the denial of a petition for a writ within its original jurisdiction or a writ of supersedeas, without issuance of an alternative writ or order to show cause, or the denial of an application for bail or to reduce bail pending appeal, or the denial of a transfer to a Court of Appeal after certification in a case within the original jurisdiction of a municipal or justice court. When a decision of a Court of Appeal is final as to said court, it is not thereafter subject to modification or rehearing by said court. Where an opinion is modified without change in the judgment, during the time allowed for rehearing, such modification shall not postpone the time that the decision becomes final as above provided; but if the judgment is modified during that time, the period specified herein begins to run anew, as of the date of modification.

(As amended, effective Jan. 1, 1957; Jan. 1, 1959; Jan. 1, 1961; Jan. 2, 1962; July 1, 1963; Nov. 11, 1966; Jan. 1, 1968; July 1, 1972; July 1, 1973.)

(b) [Filing consent to modification] If the reviewing court orders that a judgment be reversed and a new trial granted or that, in the alternative, the judgment be affirmed on condition that the party in whose favor judgment has been rendered consent to a remission of a portion thereof, or on condition that the party against whom the judgment has been rendered consent to an addition thereto, then, unless otherwise ordered, the judgment of reversal and granting of a new trial shall become final unless within 30 days after the filing of the decision two copies of a written consent by such party to the remission or addition shall be filed in the reviewing court. One of the copies shall be transmitted with the remittitur to the superior court.

Draftsman's Explanatory Notes

(a) [When decisions become final] Supersedes former Sup.Ct. Rule XXX, § 1, in part, and states existing law and practice. Cross-references: Rule 25, remittitur; Const., art. VI, §§ 2, 4c (amended 1956), when judgments become final.

(b) [Filing consent to modification] New. Cross-reference: C.C.P. 53, power to modify judgment. This rule is intended to settle the confusion as to where a consent to modification shall be filed. The requirement of filing in the reviewing court necessarily implies a time limit of 30 days after which the court loses power to modify; hence the proviso "unless otherwise ordered," to take care of situations where it is impossible to communicate with clients or impracticable to reach a decision so quickly.

Rule 27. Rehearing in Court Rendering Decision

(a) [Power to grant rehearing] The Supreme Court or a Court of Appeal may grant a rehearing after its own decision in any cause except the denial by a Court of Appeal of a petition for a writ within its original jurisdiction without issuance of an alternative writ or order to show cause or the denial of a transfer to a Court of Appeal after certification in a case within the original jurisdiction of a municipal or justice court. A rehearing may be granted on petition, as provided in subdivision (b) of this rule, or on the court's own motion, prior to but not after the time the decision becomes final therein.

(As amended, effective Jan. 1, 1957; Jan. 1, 1959; Jan. 2, 1962; Nov. 11, 1966.)

(b) [Time for filing petition] A party seeking a rehearing either in the Court of Appeal or in the Supreme Court must serve and file a petition therefor within 15 days after the filing of the decision.

(As amended, effective Jan. 1, 1957; Jan. 2, 1962; Nov. 11, 1966.)

(c) [Time for filing answer] An answer may be served and filed within 23 days after the filing of the decision.

(As amended, effective Jan. 1, 1957.)

(d) [Form of petition and answer] Insofar as practicable, the petition and answer shall conform to the provisions of rule 15.

(e) [Determination of petition] An order of the Supreme Court granting a rehearing shall be signed by at least four judges assenting thereto, and filed with the clerk. If no order is made before the decision becomes final as provided in subdivision (a) of rule 24, the petition shall be deemed denied, and the clerk shall enter a notation in the register to that effect.

(As amended, effective Jan. 1, 1961; Nov. 11, 1966.)

Draftsman's Explanatory Notes

(a) [Power to grant rehearing] Supersedes former Sup.Ct. Rule XXX, § 1, in part, and states existing law. Cross-references: Const. art. VI, §§ 2, 4c (amended 1956), on power to grant rehearings; Rule 24(a), when decision becomes final.

(b) [Time for filing petition] Supersedes former Sup.Ct. Rule XXX, §§ 1, 4, in part. Cross-references: Rule 24(a), decisions filed with clerk; Rule 16(b), number of copies of briefs; Rule 45(c), no extension of time by C.J. or P.J. The total time allowed for granting a rehearing is limited by the Constitution (see Rule 24(a)). The former rule gave 20 days (civil) and 10 days (criminal) for filing the petition; the result was that the time allowed for answer and determination was so short as to preclude adequate consideration of the answer. The new rule cuts the time for the petition to 15 days (civil) and 8 days (criminal) and thereby enlarges the time for answer and determination from 10 days to 15 days in civil cases, and from 5 days to 7 days in criminal cases [For changes made by the 1957 amendment, see Historical Note, post.]

(c) [Time for filing answer] Supersedes former Sup.Ct. Rule XXX, §§ 1, 4, in part. Cross-reference: Rule 45(c), no extension of time. This rule allows the same number of days for filing the answer as before, but states the time more clearly by specifying the number of days after filing of the decision, instead of the number of days before the decision becomes final [For changes made by the 1957 amendment, see Historical Note, post.]

(d) [Form of petition and answer] Supersedes, in part, former Sup.Ct. Rules VIII, § 2, XVIII, and XXX, § 4. Cross-reference: Rule 15, form of briefs.

(e) [Determination of petition] Supersedes former Sup.Ct. Rule XXVIII, § 2. The new rule expressly states the requirement of 4 justices' signatures in Sup.Ct. rehearings (the former language merely referred to "the members of the court assenting thereto") and adds a provision for noting the fact of automatic denial where no timely order is made.

EXHIBIT N

Rule 29. Grounds for Hearing in Supreme Court

(a) [Grounds] A hearing in the Supreme Court after decision by a Court of Appeal will be ordered (1) where it appears necessary to secure uniformity of decision or the settlement of important questions of law; (2) where the Court of Appeal was without jurisdiction of the cause; or (3) where, because of disqualification or other reason, the decision of the Court of Appeal lacks the concurrence of the required majority of qualified judges.

(As amended, effective Nov. 11, 1966.)

(b) [Examination of record] On petition for hearing the Supreme Court will not examine the record for error unless the petition shows that substantial issues of law or fact were incorrectly stated or were not considered in the opinion of the Court of Appeal and that such issues were raised in the briefs and set forth in a petition for rehearing in the Court of Appeal.

(As amended effective Nov. 11, 1966; July 1, 1970.)

Draftsman's Explanatory Notes

(a) [Grounds] Supersedes former Sup.Ct. Rule XXX, § 6. Point (1) restates former Sup.Ct. Rule XXX, § 6, embodying the holding of People v. Davis, 147 Cal. 346 [81 P. 718]. Points (2) and (3) state additional grounds for hearing established by the decisions.

(b) [Examination of record] New. The requirement that error must appear on the face of the opinion of the D.C.A. is established by a number of decisions, but has never been expressly stated in any rule. Exceptions have been recognized first, where the case was within the jurisdiction of the Sup.Ct. and was previously transferred to the D.C.A. to expedite appellate business (Burke v. Mass, 10 Cal.App. 206 [101 P. 438, 440]), and second, where the cause was an original proceeding in the D.C.A. and not an appeal (Rockridge Place Co. v. City Council, 178 Cal. 58 [172 P. 1110]). These two exceptions have been eliminated and two new exceptions are stated: where material facts are omitted or incorrectly stated, or substantial legal issues are not covered in the opinion, the petitioner may refer to the record, provided that he first calls these matters to the attention of the D.C.A. by petition for rehearing.

Rule 31. Notice of Appeal

(a) [Time of filing] In the cases provided by law, an appeal is taken by filing a written notice of appeal with the clerk of the superior court within 60 days after the rendition of the judgment or the making of the order. A notice of appeal filed prior to the time prescribed therefor is premature but may, in the discretion of the reviewing court for good cause, be treated as filed immediately after the rendition of the judgment or the making of the order.

Whenever a notice of appeal is received by the clerk of the superior court after the expiration of the period prescribed for filing such notice, the clerk shall mark it "Received (date) but not filed" and advise the party seeking to file the notice that it was received but not filed because the period for filing notice of appeal had elapsed.

(As amended, effective Jan. 1, 1951; Jan. 1, 1959; Jan. 1, 1961; Sept. 15, 1961; Nov. 13, 1968; Jan. 1, 1972.)

(b) [Form of notice] If the appeal is by the defendant the notice shall be signed by him or by his attorney, and if the appeal is by the People, the notice shall be signed by the district attorney, his deputy, or other counsel for the People. The notice shall be sufficient if it states in substance that the party appeals from a specified judgment or order or a particular part thereof, and shall be liberally construed in favor of its sufficiency. The notice need not specify the court to which the appeal is taken, and, except when judgment of death was pronounced, a notice shall be deemed to be an appeal to the Court of Appeal for the district.

(As amended, effective Jan. 1, 1959; Sept. 1, 1967; July 1, 1971.)

(c) [Notification by clerk] The clerk of the superior court shall forthwith mail a photocopy of the notice of appeal to the clerk of the reviewing court and a notification of the filing of the notice of appeal to each party other than the appellant. The notification shall state the number and title of the case and the date the notice of appeal was filed. The failure of the clerk to mail such notice or to give such notification shall not affect the validity of the appeal.

(As amended, effective July 1, 1964; Jan. 1, 1972.)

(d) [Guilty or nolo contendere plea] In cases in which a judgment of conviction was entered upon a plea of guilty or nolo contendere, the defendant shall file the statement required by Section 1237.5 of the Penal Code, which shall serve as a notice of appeal, within 60 days after the rendition of judgment, but the appeal shall not be operative unless the trial court executes and files the certificate of probable cause required by that section. Within 20 days after the defendant files his statement the trial court shall execute and file either a certificate of probable cause or an order denying such a certificate and shall forthwith notify the parties of the granting or denial of such certificate.

If the appeal from a judgment of conviction entered upon a plea of guilty or nolo contendere is based solely upon grounds (1) occurring after entry of such plea which do not challenge the validity of the plea or (2) involving a search or seizure, the validity of which was contested pursuant to section 1538.5 of the Penal Code, the provisions of section 1237.5 of the Penal Code requiring a statement by the defendant and a certificate of probable cause by the trial court are inapplicable, but the appeal shall not be operative unless the notice of appeal states that it is based upon such grounds.

The time for preparing, certifying and filing the record on appeal or for filing an agreed statement shall commence to run when the appeal becomes operative.

(Added, effective Sept. 17, 1965; as amended, effective Jan. 1, 1970; Jan. 1, 1972.)

Draftsman's Explanatory Notes

Supersedes P.C. 1239(a), 1241. Cross-references: Rule 1(a), similar provision on liberal construction; Rule 32(b), request for additional record to accompany notice of appeal; Rule 44(a), computation of time; P.C. 1239(b), Rule 32(c), automatic appeal in death case. (1) This rule makes an important change in the law by abolishing the oral notice of appeal. Most jurisdictions provide for the single method of written notice, and the change establishes uniformity with civil appeals, gives greater certainty to the notice, and allows time for deliberation. (2) The time to file notice is increased from 5 to 10 days, permitting more deliberate consideration of the question whether to appeal. Most jurisdictions have longer periods than 5 days. (3) Where probation is granted the time to appeal from an order denying a new trial is ordinarily extended until 10 days after the order granting probation. If probation is granted after affirmance of the judgment on appeal, such an extension might permit a second appeal. The new rule eliminates such a possibility. (4) * * *

EXHIBIT N

Rule 33. Contents of Record on Appeal from Judgment or Order on Motion for New Trial

(a) [Normal record] If the appeal is taken by the defendant from a judgment of conviction, or if the appeal is taken by the People from an order granting a motion for a new trial, the record on appeal, except as hereinafter stated, shall include the following (which shall constitute the normal record):

(1) A clerk's transcript, containing copies of (a) the notice of appeal, any certificate of probable cause executed and filed by the court, and any request for additional record and any order made pursuant thereto; (b) the indictment, information or accusation; (c) any demurrer; (d) any motion for a new trial; (e) all minutes of the court relating to the action; (f) the verdict; (g) the judgment or order appealed from; (h) written instructions given or refused indicating on each instruction the party requesting it.

(2) A reporter's transcript of (a) the oral proceedings taken on the trial of the cause, including jury instructions given which cannot be copied by the clerk, and proceedings at the time of sentencing or granting of probation; and (b) oral proceedings on the hearing of the motion for a new trial, and on the entry of any plea of guilty or *nolo contendere*; the transcript shall normally exclude proceedings on the voir dire examination of jurors, opening statements, and arguments to the jury.

(3) To be transmitted as originals upon request by the reviewing court as provided in rule 10: any exhibit admitted in evidence or rejected.

(As amended, effective Jan. 1, 1966; Jan. 1, 1968; Nov. 13, 1968; July 1, 1971; Jan. 1, 1976; July 1, 1976.)

(b) [Request for additional record] Either party may request the inclusion in the record of any of the following:

(1) In the clerk's transcript: (a) written motions made or notices of motion given by the defendant or by the People, and affidavits filed in support of or in opposition to the motion for new trial or any other motion; (b) any written opinion of the superior court; (c) the report of the probation officer.

(2) In the reporter's transcript: (a) proceedings under Section 1538.5 of the Penal Code; (b) proceedings on the voir dire examination of jurors; (c) opening statements; (d) arguments to the jury; (e) any oral opinion of the superior court, and comments on the evidence by the trial judge before the jury.

(3) To be transmitted as originals: any exhibits admitted in evidence or rejected that have not been requested by the reviewing court under subdivision (a).

If a party desires such additional record he shall file an application describing the material which he desires to have included and the points on which he intends to rely which make it proper to include it. The application shall be filed with the notice of appeal or as soon thereafter as is practicable; it shall be deemed denied if it is filed after the record on appeal is transmitted to the reviewing court. The clerk shall immediately present the request to the judge and notify the reporter. The judge, within five days after the filing of such application, shall make an order directing the inclusion in the record of as much of the additional material as, in his opinion, may be proper to present fairly and fully the points relied on by appellant in his application. Any denial of the application in the trial court shall be without prejudice to an application under rule 12. If the judge fails to make any order within five days after the application is filed, the material requested, with the exception of exhibits, shall be included in the clerk's and reporter's transcripts without such order.

(As amended, effective Jan. 1, 1959; Jan. 1, 1966; July 1, 1970; July 1, 1971; July 1, 1976; July 1, 1977.)

(c) [Record where automatic appeal] Where a judgment of death has been rendered and an appeal is taken automatically as provided by law, the entire record of the action shall be prepared. For the purpose of computing time for preparation of the record, the notice of appeal shall be deemed to have been filed at the time of rendition of the judgment.

Draftsman's Explanatory Notes

(a) [Normal record] Supersedes forms: Sup.Ct. Rule II, §§ 1, 7, in part. Cross-references: Rules 4, 5, reporter's and clerk's transcripts in civil appeals. (1) Rule 33 covers the important classes of criminal appeals, and subd. (a) provides for the "normal" record, containing all matters which would ordinarily be necessary for a proper consideration of any appeal, and excluding matters which would be necessary only if particular points were raised on appeal (see subd. (b)). The object of this division is to avoid the expense of preparing, and the burden of examining, useless record. (2) The "normal" record consists of a clerk's transcript and a reporter's transcript. The recital of the contents of the clerk's transcript follows former Sup.Ct. Rule II, § 1, except that instructions, motions and affidavits are eliminated and placed in the "optional" or "additional" record (subd. (b)). (3) The reporter's transcript (substantially following present practice) includes all oral proceedings except the voir dire examination of jurors, instructions and arguments of counsel. The old requirement (former Sup.Ct. Rule II, § 7), that the appellant state his points on appeal and designate portions of the proceedings to be transcribed, is abolished insofar as the "normal" record is concerned. (4) The old provision (former Sup.Ct. Rule II, § 7), directing the reporter to exclude "statements and opinions of the court not constituting rulings" unless they were objected to or assigned as error or misconduct when made, is also abolished. (5) The old provision excluding "all arguments of counsel" unless they were objected to is clarified by specifying "opening statements, and arguments to the jury."

(b) [Request for additional record] Supersedes former Sup.Ct. Rule II, §§ 1, 7, in part. Cross-references: Rules 4(a), 4(b), 5(a), 5(b), requests for record in civil appeals; Rule 51, substitute judge where trial judge unavailable; Rule 12, augmentation of record. (1) Subd. (b) covers the "optional" or "additional" record, including matters which are necessary only where particular points are raised on appeal. The procedure for obtaining the optional record substantially follows former Sup.Ct. Rule II, § 7. If the judge excludes any portion of the record deemed necessary, doubtless the aggrieved appellant can seek relief by an application to augment the record under Rule 12. (2) The provisions as to instructions differ from those governing instructions in civil appeal records (see Rule 4). If any error is urged on the basis of the instructions, all the instructions given will be copied in the record, but not necessarily in the same transcript. The clerk will copy all written instructions; the reporter will copy only those which were given orally by the judge and do not appear in the clerk's file.

(c) [Record where automatic appeal] New. Cross-references: see P.C. 1239(b), automatic appeal; P.C. 1218, copy of record to Governor. The limitations of the previous subdivisions do not apply to automatic appeals.

EXHIBIT N

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